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ADVERTISING AND THE PUBLIC INTEREST: LEGAL PROTECTION OF TRADE SYMBOLS

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> "The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the end is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress." Frankfurter, J., in *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*[1]

The law of trade symbols is of modern development, largely judge-made and only partly codified.[2] Its impetus comes from the demands of modern advertising, a black art [3] whose practitioners are part of

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1. 316 U.S. 203, 205 (1942). Short-titles to be used in this article are: BORDEN, for N.H. BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING (1942); CALLMANN, for CALLMANN, LAW OF UNFAIR COMPETITION AND TRADE-MARKS (1945).

2. Though the beginnings are remote, see SCHECHTER, HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS (1925), the significant development has occurred within the last century. For the judicial creation of the varied torts of unfair competition, including trade symbol law, see Handler, *Unfair Competition*, 21 IOWA L. REV. 175 (1936); Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289 (1940). Previous federal trade-mark legislation was thought to afford only procedural advantages; for the handful of substantive rights created by the new Lanham Act, 60 STAT. 427 (1946), 15 U.S.C.A. §§ 1051–1127 (Supp. 1947), see Diggins, *The Lanham Trade-Mark Act*, 35 GEO. L. J. 147 (1947). State statutes are of minor importance; see DERENBERG, TRADE-MARK PROTECTION AND UNFAIR TRADING 468–87 (1936); but see note 121 *infra*.

3. *Cf.* L. Hand, J., in *Proceedings in Memory of Mr. Justice Brandeis*, 317 U.S. xi, xv (1942): ". . . the art of publicity is a black art; but it has come to stay, every year adds to its potency and to the finality of its judgments. The hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country; whether we like it or not, we must learn to accept it."

the larger army which employs threats, cajolery, emotions, personality, persistence and facts in what is termed aggressive selling. Much aggressive selling involves direct personal relationships; advertising depends on the remote manipulation of symbols, most importantly of symbols directed at a mass audience through mass media, or imprinted on mass-produced goods. The essence of these symbols is distilled in the devices variously called trade-marks, trade names, brand names, or trade symbols. To the courts come frequent claims for protection, made by those who say they have fashioned a valuable symbol, and that no one else should use it. Very recently, for example, the vendors of Sun-Kist oranges lost a court battle to prevent an Illinois baker from selling Sun-Kist bread.[4] The highest court, in its most recent encounter with a like case, upheld the power of a manufacturer of rubber footwear to prevent the use of a red circle mark by a seller of rubber heels, which the plaintiff did not manufacture.[5]

In these cases, a choice of premises and techniques is still open. One set of premises, which seems to subsume Justice Frankfurter's felicitous dictum, recognizes a primary public interest in protecting the seller who asks the court to enjoin "another [who] poaches upon the commercial magnetism of a symbol he has created." This expansive conception merits critical attention. Are all forms of poaching forbidden? Should they be, consistent with another premise? This one asserts, in the words of Judge Frank, "the basic common law policy of encouraging competition, and the fact that the protection of monopolies in names is but a secondary and limiting policy." [6] The legal ties which bind together some apparently inconsistent decisions may be found, but not simply in an indiscriminate prohibition of poaching, nor yet in a presumption in favor of competition, no matter how compelling. Rather, courts move from these and other premises to refinements of doctrine.

It is proposed here to seek, in the milieu in which trade symbols are created and used, for data underlying both premises and dogma. This will require an independent evaluation of the institution of advertising. What do we get for the three billions of current annual outlay? [7] Do

4. California Fruit Growers Exchange v. Sunkist Baking Co., 166 F.2d 971 (C.C.A. 7th 1947).

5. Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U.S. 203 (1942), quoted *supra*. The opinion of the court dealt only with a technical point of accountability for profits. The dissent (the court split 4–3, with two justices not participating) questioned the plaintiff's right to any relief beyond an injunction.

6. Eastern Wine Corp. v. Winslow-Warren Ltd., 137 F.2d 955, 959 (C.C.A. 2d 1943), *cert. denied*, 320 U.S. 758 (1943).

7. The total cost of advertising can only be estimated. The most authoritative estimates have been those of the late Dr. L. D. H. Weld, published annually in PRINTER'S INK. According to his figures, the outlay reached $2.6 billions in 1929, and then fell to $1.3 billions in 1933. See tabulation in FREY, ADVERTISING 6 (1947). The 1929 figure was

we want it? Unfortunately, there is little consensus as to what values advertising serves. Its votaries have poured their most skillful symbols back in the soil from which they sprang.[8] Its detractors, maddened by the success of this propaganda, would purge Radio City with fire and sword.[9] One thing the examination will reveal is that what appear to be private disputes among hucksters almost invariably touch the public welfare. We shall therefore be concerned to ask, when courts protect trade symbols, whether their decisions further public as well as private goals.

I. TRADE SYMBOLS AND THE ECONOMICS OF ADVERTISING

The principal reason for advertising is an economic one[10]—to sell goods and services. We can describe this process, and its economic effects, with relative confidence,[11] compared to the obscurity which

not passed until 1946, $3.0 billions. For 1947 the total increased sharply to $3.9 billions. 223 PRINTER'S INK 28 (April 30, 1948). However, the recent figures, when compared to those of the '20s and '30s, represent a decreased ratio to the general level of economic activity, as indicated by national income indices. An uncertain but appreciable part of the increasing cost of packaging retail goods (estimated at about $5 billions for 1947; see 36 FORTUNE 246 (Nov. 1947)) is not but should be included in the cost of advertising; see VEBLEN, ABSENTEE OWNERSHIP 300 (1923). The contribution of advertising to periodicals and radio, which accordingly reach the public either "free" or at a reduced price, is often thought of as a substantial offset, especially by those who neglect to consider the increase in costs (*e.g.* for newsprint, disc jockeys) caused by the advertising. Borden made a painstaking analysis for 1935 and estimated that, from total advertising outlays of $1.7 billions, $377,000,000 were available to newspapers, magazines, and broadcasting after deducting costs attributable to the advertising. BORDEN 68–71.

8. *E.g.*, CALKINS, BUSINESS THE CIVILIZER (1928); SOKOLSKY, THE AMERICAN WAY OF LIFE (1939).

9. A long list of books exposing the untruths and frauds of advertising was dominated by CHASE AND SCHLINK, YOUR MONEY'S WORTH (1927), and KALLET AND SCHLINK, 100,000,000 GUINEA PIGS (1933). *See* SORENSON, THE CONSUMER MOVEMENT 9, 11 (1941). Noteworthy among general attacks on the institution was RORTY, OUR MASTER'S VOICE (1934). Current output is slight; see CLARK, THE ADVERTISING SMOKE SCREEN (1944); WAKEMAN, THE HUCKSTERS (1946).

10. There are important non-economic or mixed motives for advertising; but they have been insufficiently explored to warrant comment. A listing of several may be suggestive:

(1) Self-aggrandizement of the advertiser. A revealing handbook, GOODE, ADVERTISING 16 (3d ed. 1941) states that "the advertiser's motive . . . may—and justly—be either primarily for self-expression or primarily to sell goods."

(2) Institutional inertia—because everyone else does.

(3) Tax considerations—the government will pay for it anyway.

(4) Political considerations—to influence public opinion on issues which only indirectly affect the economic welfare of the advertiser.

11. The most extensive study of the economics of advertising is BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING (1942), referred to herein as BORDEN. It was sponsored by the Advertising Research Foundation and executed at the Harvard Business School. Its stated premises are pro-advertising; the data are scrupulously presented. I have felt free to rely on it, as a scholarly moderate case for persuasive advertising, and to differ

surrounds the psychological, cultural, or other social consequences of modern advertising. These may turn out to be more portentous than the affairs of the market-place. But the materials are uncollected or unrefined. In this survey we can only drop a handful of problems into a footnote.[12] The reader must make his own judgments from his own observations, remembering, as we turn almost exclusively to economic discussion, that man does not live by bread alone.

Informative and Persuasive Advertising

The buying public submits to a vast outpouring of words and pictures from the advertisers, in which, mingled with exhortations to buy, is a modicum of information about the goods offered. From the point of view of the economic purist, imparting information is the only useful function of advertising.[13] A perfect market demands perfect enlightenment of those who buy and sell. One of the many imperfections of the real world is that, absent advertising, most buyers would have to go to a great deal of trouble to discover what is offered for sale.[14] To the extent that the blandishments of sellers inform buyers what is to be bought, and at what price, advertising undoubtedly helps to quicken the stream of commerce.[15]

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with some of its conclusions. Most books on advertising are trade manuals or textbooks which grapple inadequately with disputed major issues; see, however, A. W. FREY, ADVERTISING 654–731 (1947).

12. Social psychology textbooks have little or nothing to say about the effects of persuasive advertising on personality. Yet the possibilities for investigation are numerous. For example, to what extent does creation of wants which the consumer cannot satisfy increase or decrease frustration and insecurity? See LYND AND LYND, MIDDLETOWN, c. viii (1929) "Why Do They Work So Hard?". Has the pre-emption by the advertiser "of the common value-symbols of our culture, the symbols of courage, of beauty, of domesticity, of patriotism, of happiness, and even of religion, for the purposes of *selling*," led to altered attitudes toward the values themselves? See Hayakawa, *Poetry and Advertising*, 3 ETC. 116, 119 (1946). A check of PSYCHOLOGICAL ABSTRACTS for the period 1937–46, *s.v. Advertising*, reveals nothing but applied research directed to commercial results. And what of "the workings of advertising upon language and manners and character"? *See* William McFee, quoted in CHASE, THE TRAGEDY OF WASTE 122 (1925).

13. MARSHALL, INDUSTRY AND TRADE 304–7 (1927); PIGOU, ECONOMICS OF WELFARE 196–9 (4th ed. 1938). *Cf.* CHERINGTON, THE CONSUMER LOOKS AT ADVERTISING 186 (1928) (author was Director of Research for J. Walter Thompson Co.): "I even wonder at times whether there is any economic justification for any advertising which cannot meet one simple test: *Is it designed to make the final consumer a more competent buyer?*

"When we get away from a comparatively simple conception of advertising like this, we at once get into trouble trying to justify it on economic grounds."

14. Sellers are in possibly worse straits when they commit resources to production with imperfect knowledge of probable demand; however, improved techniques of marketing research are making increasing quantities of data available. See generally, BLANKENSHIP, CONSUMER AND OPINION RESEARCH (1943); L. O. BROWN, MARKET RESEARCH AND ANALYSIS (1937).

15. "Its chief function is to *educate*. . . . This view of the economic value of advertising rests upon the premise that information about goods and services is in itself an eco-

Most advertising, however, is designed not to inform, but to persuade and influence.[16] What is the occasion for such tremendous outlays on persuasion and influence in a well-ordered economic system? If we consider first the total stream of production and consumption, persuasive advertising seems only to consume resources that might be put to better use producing more goods and services. It does not increase total demand; it only increases wants. Effective demand arises, not from what we would like to have, but from the purchasing power of the community created by its productive power. We consume what we produce, and no more. Considering the economic welfare of the community as a whole, to use up part of the national product persuading people to buy product *A* rather than product *B* appears to be a waste of resources.

Perhaps advertising helps to produce more, if it goads people to work longer and harder.[17] At first blush, this seems a moral and salutary prescription. On second thought, one realizes that more work and more goods means less leisure. Are we interested only in greater possessions? In its own right, and as a time to consume the fruits of labor, leisure is highly prized. Somehow a balance has to be struck between work and play, but the degree of discontent which the advertisers can create is not the way to do it.[18]

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nomic utility." Hotchkiss, *An Economic Defense of Advertising*, 15 AM. ECON. REV. SUPP. 14, 18 (1925).

16. Statistical verification is necessarily imprecise. However, "detailed tabulations to establish the truth of this statement are not necessary". BORDEN 665. For a typical attempt, see WAITE AND CASSADY, THE CONSUMER AND THE ECONOMIC ORDER 166 (1939) (analysis of 800 magazine advertisements: 15% informative, 85% persuasive). *But cf.* AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, COMMITTEE ON CONSUMER RELATIONS IN ADVERTISING, INFORMATION IN ADVERTISING II (1946). The difficulty of drawing a firm line between informative and persuasive advertising does not impair the conclusion that most advertising conveys few useful facts about either the goods and services or their origin. A statement of the informative functions of trade symbols is attempted p. 1185 *infra*. Advertising, especially on labels, can provide much fuller descriptive data than can symbols, which are only guideposts. See M. G. REID, CONSUMERS AND THE MARKET c. XXVI (3d ed. 1942). Industrial advertising, directed at trained buyers unresponsive to emotional appeals, is often cited as a model of information without embellishment. But see Duncan, *What Motivates Business Buyers*, 18 HARV. BUS. REV. 448 (1940).

17. Thus, a mine manager in a foreign country is said to have stimulated his indolent employees by presenting them with Sears-Roebuck catalogues. Phillips, *The Role of Non-Price Competition*, in CHAMBER OF COMMERCE OF THE UNITED STATES, PRICING PROBLEMS AND THE STABILIZATION OF PROSPERITY 60, 70 (1947).

For an historical approach to the influence of consumption standards on production, see Gilboy, *Demand as a Factor in the Industrial Revolution*, in FACTS AND FACTORS IN ECONOMIC HISTORY 620 (1932).

18. It may be argued that greater output can be achieved in a shorter time, given the incentive. This is otherwise known as the "speedup" and by other invidious terms. The worker who exhausts himself to get everything in the Sears catalogue may not enjoy his possessions much. In any case, the problem reduces to one of choice (pp. 1182 *infra*) between an over-advertised good (money) and a less advertised one (leisure).

In any case, there is a system for multiplying both goods and leisure which has been in operation for some time with some success. It consists of putting savings to work in the form of machines, and is called capitalism, or the Industrial Revolution, or whatever label is politically pleasing. If the process of capital investment is at all affected by advertising, that relationship is far more important to explore than the unsatisfactory proposition that advertising increases production by making people work more.

Any possible connection between advertising and capital investment is especially worth pursuing, because the new economics has taught us that if the rate of additions to or replacements of capital equipment declines, total production and income will also decline, and to a much greater extent. The level of production is a function of the level of investment, and the level of investment is a function of the expectations of enterprisers.[19] People do not start new businesses or expand old ones unless they think they see a profit in it, and that is where advertising comes in. To pursue the relation between persuasive advertising and profits, we shall have to make our way through the thickets of monopolistic competition and the slough of mass-production cost economies. Whatever profit advantages advertising offers spring chiefly from these two sources. Only after exploring them can we consider whether profits, so derived, facilitate the total flow of investment.

Market Control and Differentiation

How does the privilege of an entrepreneur to spend money on advertising increase the likelihood of profit at all, in a system described by its proponents as one of free competition? The competitive system, after all, postulates many sellers offering uniform products to many buyers. For any good, at a given time, there is a single market price, at which any seller can sell all he chooses to produce, *i.e.*, all that it is profitable for him to produce. In a pure economy, advertising outlays (except for information to make the market more nearly perfect) would only add to the costs, and *decrease* the profit, of any firm.[20]

It is easy to escape from this dilemma by reminding ourselves that pure competition is descriptive only of an ideal, not of the real world.[21]

19. The doctrines here crudely summarized from KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1936), can now be found in elementary textbooks: *e.g.* TARSHIS, THE ELEMENTS OF ECONOMICS, pt. IV (1947); T. MORGAN, INCOME AND EMPLOYMENT (1947). As stated in the text, they of course require a broadly qualifying "other things being equal," especially as regards the propensity to consume.

20. MEADE AND HITCH, AN INTRODUCTION TO ECONOMIC ANALYSIS AND POLICY 176 (1940).

21. See, *e.g.*, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY (TNEC Monograph 21, 1940).

We have long since settled for such compromise goals as "workable" competition,[22] which take account of the fact that actual markets are a blend of competitive and monopolistic elements, reflecting the unwillingness of men of business to sell at prices impersonally determined. The term "monopolistic" means only the acquisition of any degree of control over a market, either as regards price or entry.[23] Most entrepreneurs strive to achieve some degree of control, for it enables them to have a price *policy* directed at maximizing profits, instead of leaving all to the chances of a competitive market.[24] They seek to escape from competition in two principal ways: (1) By dominating the market, either through a loose or close-knit combination of firms, or by the growth of a single firm. Examples are steel,[25] shoe machinery,[26] aluminum.[27] The main drive of the antitrust laws is to retard this trend.[28] (2) By differentiating their products, in order to carve out a separate market in which demand, price, and output can be manipulated within limits to be discussed.[29] The main drive of advertising is to facilitate this latter form of control.

22. Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940).

23. Mason, *Monopoly in Law and Economics*, 47 YALE L. J. 34 (1937). Any form of the word "monopoly" has unavoidable emotional associations. My intention is to use it as descriptive of business structures which are widely prevalent. The reader must decide for himself whether the apparent consequences make him happy or sad. Furthermore, the adjective "monopolistic" reflects a technical controversy among economists. See White, *A Review of Monopolistic and Imperfect Competition Theories*, 26 AM. ECON. REV. 637, 642 (1936). The concept of "monopolistic competition" as employed here is intended in the sense prescribed by Professor Chamberlin, note 29 *infra*.

24. It cannot be over-emphasized that the ability of a firm to have a price policy other than willingness or unwillingness to sell at a market price is evidence that competition is not free of monopoly elements. The variety and complexity of price policy is suggested by HAMILTON AND ASSOCIATES, PRICE AND PRICE POLICIES (1938); Mason, *Price and Production Policies of Large-Scale Enterprise*, 29 AM. ECON. REV. SUPP. 61 (1939); Nourse, *The Meaning of "Price Policy"*, 55 Q. J. ECON. 175 (1941).

25. United States v. United States Steel Corp., 251 U.S. 417 (1920); Amended complaint, FTC Docket 5508, American Iron and Steel Institute, 3 CCH TRADE REG. REP. ¶ 13,641 (1947).

26. United States v. United Shoe Machinery Co. of N. J., 247 U.S. 32 (1918); Complaint, United States v. United Shoe Machinery Corp., Civil 7198, CCH TRADE REG. REP. ('48–'51 Court Decisions) ¶ 61,093 (D.Mass. 1947).

27. United States v. Aluminum Co. of America, 148 F.2d 416 (C.C.A. 2d 1945). Misuse of the patent laws has in recent years also assumed the proportions of a major escape; see OPPENHEIM, CASES ON FEDERAL ANTI-TRUST LAWS, 477 *et seq.* (1948).

28. Levi, *The Anti-trust Laws and Monopoly*, 14 U. OF CHI. L. REV. 153 (1947); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, *id.* at 567.

29. This classification, and the analysis which follows, rest on the theoretical foundation provided by CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (5th ed. 1946). Though controversy exists over some aspects of Professor Chamberlin's teaching, its main outlines do not require documentation. They are accepted in BORDEN, c. VI, contrary to the reviewer who exulted that, "Neil Borden today invalidates the thesis of Edward Chamberlin, demonstrating the fallacies in the theory of monopolistic competi-

The process may be exemplified by the familiar case of cigarettes, which shows clearly how differentiation serves to increase the price of an advertised article, relative to the prices of substitutes.[30] Taking the industry as a whole, heavy advertising may first make consumers more willing than they would otherwise be to pay the prices set for cigarettes, and to forego such alternative satisfactions as cigars, candy, and sodas. Thus the total consumer outlay for cigarettes may be increased, to the benefit of both advertising and non-advertising manufacturers.[31]

Benefit to the advertiser alone comes with the preference he is able to establish for his brand over unadvertised brands. If this preference translated into price is more than the outlay on advertising required to accomplish the persuasion, differentiation is profitable. How profitable it is for the advertised brands of cigarettes is indicated by the price policy of the leading companies in the thirties. During the period of greatest rivalry with what were then ten-cent cigarettes, the Big Three could maintain a three-cent difference in retail price per pack and still hold unadvertised competition in check. The cost of advertising was not more than a cent a pack; the tobacco used in the standard brands cost about half a cent a pack more than that in the economy brands. Thus less than a cent and a half in costs brought in three cents in revenue.[32] The famous blindfold tests raised doubts whether smokers could actually tell one brand from another, even as between standard and economy brands.[33] But, from the point of view of the advertiser as well as that of the economist, whether the differentiation is real or spurious does not affect the result.[34] The only necessity is for buyers

tion." Gardner, *The Business View of Advertising Policy*, 6 J. OF MARKETING, pt. II, 112, 115 (1942).

30. I ignore without apology the interesting definitional problems, what is an industry, a product, a substitute? Though economists must resort to such terms as "nebulous" in referring to the concept of an industry, and "good" or "poor" in referring to substitutes for a product, see STIGLER, THEORY OF PRICE 238, 280 (1947), theorists, entrepreneurs, and consumers can all have workable notions, even if they cannot define them.

31. BORDEN 207–49, 492–6, 535–49 discusses the effect of advertising on demand, cost and price of cigarettes. He concludes that, so far as primary demand is concerned (for cigarettes as a product), advertising chiefly speeded up a favorable trend otherwise created. It has, however, been highly effective in diverting selective demand (from brand to brand).

32. *Id.* at 444, 546. Advertising outlays amounted to 10–20% of net sales, less excise taxes. The figure on cost of tobacco is drawn from data for 1941–42, the first reliable material available. OFFICE OF TEMPORARY CONTROLS, OPA ECONOMIC DATA SERIES No. 21, SURVEY OF TOBACCO PRODUCT MANUFACTURERS 6 (1948). In 1941, manufacturers' net margin averaged 1.3 cents per pack for standard brands, 0.1 cents per pack for economy brands. *Ibid.*

33. BURTT, PSYCHOLOGY OF ADVERTISING 370 (1938).

34. Claude Hopkins, whose autobiography is revered in advertising circles, described an early success in these terms: "Van Camp's pork and beans offered no unique argu-

to believe that there is a difference, and to be willing to pay to satisfy the preference created for the advertised product. Their willingness establishes the degree of market control.

Even if the main drive of advertising is to decrease competition, what about the frequent fierce rivalry between advertisers? Is that not competition? Emphatically, it is not, in any economically useful sense of the word. The only kind of competition contemplated by the major cigarette manufacturers is competition for a higher degree of monopoly power, for a larger share of a market which is already insulated from the price competition of non-advertisers.[35] The uniformity of price among advertised products like cigarettes is not the uniformity of a perfectly competitive market. It is a price set by price leadership or by tacit agreement among a few sellers, and it is high enough for the advertisers to spend large sums in attempting to divert customers from one another. If the number of advertising sellers is large, as is the case with medicines,[36] there may be no uniformity of price. But the differences reflect the varying exploitation by each seller of his differentiated market, and only rarely the incidence of price competition. What price a competitive market would bring is suggested for almost any drug by the spread between the advertised product and its unheralded chemical equivalent. The standard example is aspirin; in 1938 an ounce of acetylsalicylic acid at wholesale cost $.13; an ounce of Bayer Aspirin, $.75. Other advertised brands trailed after Bayer.[37]

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ments. They were like other pork and beans. When we met in the factory and served half a dozen brands, not a man present could decide which was Van Camp's. But we told facts which no one else ever told . . . we centered our attack on the weak spots, made Van Camp's seem the one way out. And we created an enormous demand. Not only that, but the Van Camp's brand commanded a much higher price than our rivals'." HOPKINS, MY LIFE IN ADVERTISING 101–3 (1927).

35. American Tobacco Co. v. United States, 328 U.S. 781 (1946), upheld a conviction of the three major cigarette companies under Section 2 of the Sherman Act. Both the Supreme Court opinion and that of the Circuit Court of Appeals, 147 F.2d 93 (C.C.A. 6th, 1944), contain valuable material on the coordinated activity of the majors to subdue the competition of the unadvertised brands, and on their heavy use of advertising, first to accomplish minor diversions of demand from each other, and second to retain their dominant position in the industry. All these conditions have continued despite the successful prosecution. In 1947 the three leading brands had 80.2% of the domestic market, the three leading companies 84.7% of total cigarette sales. Unadvertised cigarettes seem almost to have disappeared; the rest of the market is held by minor advertised brands (Philip Morris, Old Gold, etc.). Business Week, Jan. 17, 1948, p. 42.

36. The census reported 1,094 manufacturers of drugs and medicines in 1939. 2 BUREAU OF THE CENSUS, MANUFACTURES 1939, pt. 1, 771 (1942). "No other business deals in so great a number of trademark articles." 31 T. M. REP. 13 (1941).

37. NELSON AND KEIM, PRICE BEHAVIOR AND BUSINESS POLICY 81, 371 (TNEC Monograph 1, 1940); BORDEN 576–8. Many similar instances are reported in these references. In a recent case, the producer of "Benzedrine" sued a seller of the chemical equivalent, amphetamine sulphate, alleging deceptive imitation of appearance of the tablets. In dismissing, the court said, "It appears from the affidavits that defendant is able to market its amphetamine sulphate tablets at approximately one-tenth the price that

In between the extremes of industry organization (few sellers, one product; many sellers, many products) lies a gamut of permutations; but the common element, wherever there are successful advertisers, is a trend away from one or more characteristics of a competitive market.[38]

The achievement of profitable differentiation by persuasive advertising is not an automatic process. Attempts by firms or industries to do so have often failed.[39] Borden concludes that if demand in general for the product is declining, advertising cannot reverse the trend. Cigars are a standard example. Further, there are still many goods so defiantly homogenous that not all the ad-man's magic can persuade the public that one brand is different from another. Sugar is a case in point; the producers, unable to achieve monopoly power through advertising, turned to conspiracy.[40] At the other extreme, some articles—for example women's dresses or fresh vegetables—flaunt their differences so self-evidently that attempts to establish brand preferences are practically useless. In between is a wide range in which artful or blatant persuasion can compound from a few real differences a dizzy variety of brands, each with its loyal band of buyers [41] whose demand schedules have been mesmerized into inelasticity. The competition to create such a monopolized market is often so fierce that, as will be shown, brands jostle for attention and their effects sometimes cancel out.

But the histories of a host of consumers' goods—packaged foods,

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is charged by the plaintiff . . . this is perhaps the plaintiff's main grievance." Smith, Kline & French Laboratories v. Waldman, 69 F.Supp. 646, 649 (E.D.Pa. 1946).

38. Another advantage of differentiation is quite valuable in an unstable economy. Since demand for each seller's product becomes less elastic, *i.e.* relatively unaffected by changes in price, the price of a differentiated article need not fall so far or so fast in bad times as would a comparable competitive price. BORDEN 850–1 summarizes the considerable evidence derived from the price rigidity of many differentiated brands during the depression. The major cigarette companies, in a remarkable episode, even increased prices in 1931. Liggett & Myers officials felt that the rise, initiated by Reynolds, was a mistake, "but they contended that unless they also raised their list price for Chesterfields, the other companies would have greater resources to spend in advertising and thus would put Chesterfield cigarettes at a competitive disadvantage." United States v. American Tobacco Co., 328 U.S. 781, 805 (1946). The concept of competition implicit in this candid admission speaks for itself. After the increase, volume of sales declined, but profits did not. *Ibid. Cf.* STIGLER, THEORY OF PRICE (1947) 239–40.

39. The examples which follow are drawn from BORDEN c. XVI.

40. BORDEN 285; The Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936).

41. Brand loyalties may be established by the influence of advertising, the attributes of the product, or by other tendencies to buy. Once established, all the motives for buying a brand may reinforce each other until buyers "build up so strong a loyalty—for which the emotional bases are usually quite obscure—that they are convinced that Chesterfields, for example, are the best, and will try to rationalize their choice. It has become an autonomous habit to associate Chesterfield's well-established name, package, and advertising with the idea or act of buying cigarettes." Allen, *A Psychology of Motivation for Advertisers,* 25 J. OF APPLIED PSYCH. 378, 383 (1941).

cosmetics, kitchen appliances, to mention only a few major fields—are proof that it does pay to advertise, that it pays in higher prices and higher profits than if the product was in undifferentiated competition with like products in a competitive market.

Unit Cost Economies

Another supposed major advantage is that advertising, by increasing sales, enables the firm to reach lower unit costs, resulting from the increased efficiency of large-scale operation, and from the spreading of fixed costs over a greater number of units.[42] The attainment of output compatible with lowest costs will be automatic in a classically competitive market.[43] However, we accept the facts of life. In a differentiated market, like that for soap, advertising may run to twenty per cent or more of the manufacturer's selling price [44] and to multi-million annual expenditures by single companies.[45] A soap manufacturer who wants to sell soap either accepts a very low price in the face of extreme brand preferences,[46] or commissions a set of soap operas. As the result of advertising he may get a share of the market which approaches the most efficient capacity of a soap factory. Aside from the unfortunate

42. If one accepts the further claim (not necessarily warranted under conditions of monopolistic competition) that lower costs will result in lower prices, the public will also benefit. *Compare* SANDAGE, ADVERTISING THEORY AND PRACTICE 26 (1939) *with* LEVER, ADVERTISING AND ECONOMIC THEORY 94 (1947).

Note the progression, in the following oft-quoted statement, from guarded premise to unbridled conclusion: "When General Foods first took over the Jell-O Company, Jell-O was selling to the consumer for an average of 12¢ per package. Today the prevailing price is around 5½¢ to 6¢ per package. The decrease in price has been made possible only by successive increases in output, and the successive increases in output have been made possible, partly at least, through advertising. The total advertising cost at the present time is under one-half of a cent per package—what's wrong with advertising when it works that way? . . . Could the price of Jell-O have come down without advertising? If so, I would like to know how!" Francis, *A Challenge to Marketing Men*, 3 J. OF MARKETING 27, 31 (1938).

43. CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION, c. II (5th ed. 1946).

44. BORDEN 443, Table 105. See the case history of Rinso, *id.* at 93–5, 454–5. Lever Bros. set the price to match that of other powdered soaps, which allowed a wide margin for advertising outlays. These were boldly undertaken, and at first were more than 50% of sales value. In a few years sales volume had increased to the point where the same total advertising outlay (about $1,200,000 annually) amounted to only 20% of sales value. The venture was not immediately profitable, but soon became so.

45. Procter and Gamble makes the largest expenditures in magazines and radio of any advertiser—$23,665,000 in 1947. The other two dominant soap companies are fourth and sixth in the same ranking. 223 PRINTER'S INK 82 (1948). The three largest companies probably have 80% of the business; see 19 FORTUNE 77, 82 (Apr. 1939).

46. See BORDEN 596–7 for an account of a large retail chain, which could buy an unadvertised brand of powdered soap at 60% of the wholesale price of Rinso or Oxydol, and sell it for 14 cents a package as against 19 cents for the advertised brands, retaining a wider margin than on the advertised brands. The chain's executives were not sure that it would sell, even at a 30% price advantage.

fact that little material is available on the optimum size of plants, soap or otherwise,[47] there is even less to suggest that advertising is directed toward achieving any such level of sales. In theory, the producer bent on maximizing profits will, under conditions of monopolistic competition, tend to hold down output short of most efficient capacity. In practice, he may not know what his most profitable output is, and, if advertising has opened the market sufficiently, may produce far beyond the point either of maximum profits or of lowest average costs.[48] In any case, the extreme diversity of possible and actual cost situations makes generalization especially difficult. Even if it were possible to construct accurate cost curves for some sample cases, the question would still remain whether any economies achieved by an increase in production exceeded the selling costs [49] incurred by advertising (or other aggressive selling devices). Borden decided that the evidence is inconclusive.[50] As a general proposition, then, we cannot say that advertising increases profits (or reduces prices) by decreasing costs, though it may do so in some instances.

One special case of importance is that of a product in an early stage of development, with very limited sales. Its price almost invariably decreases as large-scale production is achieved. If the good is one which is extensively advertised, it is argued that advertising is responsible for the increase in sales and therefore for the decrease in price. The mechanical refrigerator is a conspicuous example.[51] Such instances ignore the possibility that demand for a meritorious product might spring from its merits. No one doubts that hand-made refrigerators cost more than mass-produced refrigerators, and that a volume of demand was necessary to make mass-production feasible. Did advertising create the demand? Or was it advertising plus the desirability of the product, plus the improvements in quality, reliability, etc., that one expects from time and effort? It is worth noting that once strong brand preferences had been created in the refrigerator field, the re-

47. See RELATIVE EFFICIENCY OF LARGE, MEDIUM-SIZED AND SMALL BUSINESS (TNEC Monograph 13, 1941). The common identification of large size with efficiency is meeting increasingly critical examination. See Symposium, *Does Large-Scale Enterprise Result in Low Costs?*, 38 AM. ECON. REV. SUPP. 121 (1948).

48. See LEVER, ADVERTISING AND ECONOMIC THEORY cc. 9, 12 (1947).

49. The conventional separation of production costs from selling costs should not overlook the fact that the marketing process involves many costs necessary to create desired space-time utilities. These distribution costs should be distinguished from selling costs incurred by the seller, in Chamberlin's terms, "to alter the position or shape of the demand curve for a product." CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION 117 (5th ed. 1946). The theoretical analysis of the effect of selling costs is almost as complex as the practical difficulties of cost-accounting and of determining the effect of advertising on sales, competitors' reactions, etc. *Id.* c. VI; Buchanan, *Advertising Expenditures: A Suggested Treatment*, 50 J. POL. ECON. 537 (1942).

50. BORDEN 524.

51. BORDEN c. XV gives the history of the promotion of the mechanical refrigerator.

markable price reductions that had marked the development period came to an end, and from about 1933 to 1940 prices were relatively stable, though sales continued to increase. In the latter year, with the market at the old prices pretty well saturated, the introduction of "stripped-down" models touched off another round of price competition, unfortunately terminated by war and inflation.[52]

That advertising (or aggressive selling generally) may speed up the growth in demand for mechanical refrigerators or any other innovation is not doubted. The refrigerator caught on in a decade, while our rude forebears might have gone without ice cubes for a generation. Such acceleration is presumably a good in itself, and is a legitimate boon to the investor. Business men, advisedly, take short views. A project which will pay off its development costs in five years is more attractive in an unstable world than one requiring ten, even if the long-run profit prospect is the same for both. Both the information and influence functions of advertising help a new venture catch on, and thus shorten the period of uneconomic small-scale production. In the growth stage, they may, besides rapidly enlarging demand, increase its elasticity, so that the market will respond rewardingly to price reductions.[53]

Advertising and Investment—Conclusions

The catalytic action of advertising on new enterprises brings us back to a point of departure: the question whether advertising stimulates capital goods outlays. Profit, we know, is the bait for investment; and competition involves uncertainty. Without, for the moment, questioning these incomplete axioms, let us consider a hypothetical prudent capitalist who proposes to launch a new washing machine. He faces, among others, two major hazards: consumers may not know they want it, and competitors may crowd in and sell it cheaper than he would like. Advertising can solve both problems. First, it can stimulate demand for the product—the new, electronic, waterless washing machine. Second, it can develop a secondary demand for the promoter's own brand—the new Synchro-Dyne electronic waterless washing machine; accept no substitutes. So far as the advertising describes something new it serves, as we have seen, a function useful to both seller and community. The probability of protected profits, however, is the major attraction to the entrepreneur. A differentiated brand, like a patent, a secret process, control over distribution channels, or control of raw materials, is a safeguard against the risks of competition. All these devices may encourage investment by those who are

52. *Id.* at 571.

53. *Id.* at 437. An increase in elasticity during the growth period occurs when an increasing number of consumers learn about, want, and then buy the article as the price comes down. This is not inconsistent with the inelasticity which advertising of established products fosters. See note 38 *supra.*

able to take advantage of them. Therefore, it is argued, we must look on them with tolerance; a considerable degree of monopoly power, we are told, is not a bad thing, but a social necessity to keep the river of capital funds flowing.[54]

It is quite likely that observation of the investment process would show extensive reliance on anti-competitive arrangements. If they exist and are profitable, one would hardly expect them to be overlooked. Whether total investment is thereby increased is a different and dubious matter. If the industry is one in which entry is easy and differentiation feasible and not already fully exploited—furniture seems to be a current example [55]—additional investment in that industry may be induced by the hope of monopoly profits. But does this represent investment which would not otherwise be made? It is possible that it will simply be diverted from industries which are less profitable because they are more competitive.

Further, does not the protection of one person's investment in the manner suggested, imply the suppression of investment by others? [56] The possibility is most clearly seen in industries in which heavy advertising differentiation has accompanied a high degree of concentration. It is not difficult to imagine that an aspiring cigarette manufacturer, confronted by the Big Three and their satellites, would be deterred by the large outlays necessary for advertising,[57] and by the inefficacy, already sketched, of pure price competition. If investment relies on market control, which sooner or later requires restrictions on entry, where is the freedom in free enterprise?

The investigations necessary to strike a quantitative balance between investment encouraged and investment discouraged by monopoly devices of any sort do not exist, and the theoretical investigations are sketchy. It seems fair to say that we have no evidence that advertising stimulates the total flow of investment, except through its accelerating effect on the growth period of new enterprises.[58]

54. This point of view is most persuasively put by SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 87–92 (2d ed. 1947). *But cf.* Abramovitz, *Savings and Investment,* 32 AM. ECON. REV. SUPP. No. 2, TNEC Papers, 53, 81–6 (1942).

55. See Buckingham, *Battle of the Brands,* 39 ADV. & SELLING 96 (June 1946).

56. See T. MORGAN, INCOME AND EMPLOYMENT 207–8 (1947); PIGOU, ECONOMICS OF WELFARE 207–8 (4th ed. 1938).

57. See BORDEN 232-3 for conjectures about the outlays required to launch the Old Gold and Philip Morris brands.

58. Even if advertising has no important effect on investment, perhaps it can compensate for a declining investment rate by increasing the propensity to consume, a measure which the under-consumptionist school recommends as a cure for "oversaving." The advertising economists have picked up this ball, but have not run with it, perhaps because of a sound hunch that they might run the wrong way. Oversaving may be nothing but a wrong name for under-investment. Indeed, in 1948 it appeared that inflation was fanned because people were not saving enough to finance investment. See L. KLEIN, THE

In fact, so long as the control of prices and profits available to successful advertisers does attract new capital to an industry, serious misallocation of resources and the ultimate disappearance of monopoly profits is likely to follow. A competitive price system supposedly purges inefficient producers. When price and output are influenced by advertising, the structure of the industry approaches the optimum only by coincidence. In the Canadian baking industry, with high prices supported by collusion and advertising, thousands of inefficient small bakers exist under the price umbrella, while the large units have excess capacity.[59] In the rubber tire industry, contrariwise, the smaller units are the more efficient, but "advertising seems to be the main factor" in supporting the overlarge plants of the four biggest producers.[60] Such toleration of inefficiency and excess capacity leads to high costs, whose pressure may push profits below the competitive level. One element of such costs is the advertising expense incurred in struggling to keep the market differentiated and inelastic, and prices high. These drab developments, as we have seen, are far from inevitable in any single firm or industry. But for the economy as a whole the conclusion seems inescapable that the resources, measured in billions, going into persuasive advertising, result only in a curtailed output of real goods.[61]

KEYNESIAN REVOLUTION 175 (1947); BORDEN 187; Rothschild, *A Note on Advertising*, 52 ECON. J. 112 (1942).

Another diffident Keynesian argument is that advertising expenditures help overcome depression because they are themselves investment in the sense that they create employment and have a multiplier effect. See LEVER, ADVERTISING AND ECONOMIC THEORY, c. 7 (1947), following Rothschild, *A Note On Advertising*, 52 ECON. J. 112 (1942). This may be true, as it would be of paying people to dig holes and fill them up again, or of any other increment of spending; but it adds nothing to the stock of capital. Besides, advertising outlays vary with the cycle, not counter to it. BORDEN c. XXV.

59. Reynolds, *The Canadian Baking Industry: A Study of An Imperfect Market* 52 Q. J. ECON. 659 (1938). Branded bread is a good example of spurious differentiation; the product is in fact pretty much standardized. *Ibid.*; Joyce, *Today's Promotion of Branded Bread*, 33 ADV. & SELLING 30 (Sept. 1940).

60. Reynolds, *Competition in the Rubber-Tire Industry*, 28 AM. ECON. REV. 459 (1938).

61. These conclusions are now generally accepted in economics, I believe, and are commonplace in the textbooks; see *e.g.*, BOULDING, ECONOMIC ANALYSIS 620–1 (1941). The significant arguments pro and con have been reviewed at length here because the conclusions reached probably do not have general popular acceptance, especially among those whose training antedates the development of the theory of monopolistic competition. A survey of textbooks of twenty years ago indicates little or no concern with the problem, with the exception of SLICHTER, MODERN ECONOMIC SOCIETY 553–7 (1931 ed.).

The economic consequences of persuasive advertising are sometimes lumped together with the influence of fashion, improvements of quality or service, and other minor devices, as manifestations of a more general phenomenon: non-price competition. See A. BURNS, THE DECLINE OF COMPETITION, c. VIII (1936); NELSON AND KEIM, PRICE BEHAVIOR AND BUSINESS POLICY, c. III (TNEC Monograph 1, 1940). This categorization, while meaningful in some respects, obscures important distinctions. On the one hand, the role of style is somewhat autonomous, and only partially controllable by sellers. On the other,

It is only an affirmation of capitalist faith to insist that the search for profit should guide the firm. And in America we have always been prodigal with our resources. But when international tensions counsel a policy of conservation, while the world at large clamors for cheap goods in plenty, profits alone, when earned under the conditions described, seem inadequate justification for persuasive advertising.

The Sovereign Consumer

Defenders of the institution have two additional lines of defense. The first is that persuasive advertising creates a cluster of values, no less real because they are intangible. The second, related to the first, argues that the sovereign consumer has made a free election between those values and the austerities of price competition.

These considerations bring us to the consumer as an individual. As an individual, instead of a faceless component of mass purchasing power, he is a creature of infinite diversity, with, moreover, a soul. To make a complete analysis of what he gets from advertising, the relations of material rewards and spiritual values, as affected by advertising, would have to be considered. That task we must leave to the philosophers and the psychologists. As was indicated earlier, they have not yet performed it.[62] The only arena which is at all adequately staked out is that of the economic conflict between seller and buyer. The agreed goal is the maximum satisfaction of each consumer, as determined by his free choice in disposing of his income.[63] In a roundabout way, problems of aggregate output and investment, already discussed, bear on the same goal. Now we have to consider how persuasive advertising adds to or subtracts from the sum of the individual's satisfied wants.

What are the intangible values? One is said to be the assurance of

improvements in quality, in lieu of reductions in price, though they are often dictated by monopolistic price policy, at least offer ponderable utilities. Their drawback is the failure to reach buyers who cannot afford the higher price for the fancy model.

62. See note 12 *supra*.

63. For extensive discussions of consumer choice, see KYRK, A THEORY OF CONSUMPTION (1923); WYAND, THE ECONOMICS OF CONSUMPTION (1937). The use here of the concept is not without awareness of its ambiguities. For example, many members of our society delegate their power of choice, especially to housewives. Others are largely deprived of it, for example if they are drafted. So effective choice is concentrated. The persons who exercise it most, besides agents of the government, are the heads of families, who are not selected primarily for their competence in buying. For this and numerous other reasons the diminution of persuasion would not lead to completely rational satisfaction of wants, even if one includes in the term "rational" a degree of rational irrationality, a paradox I trust will be intelligible in the light of the context. Perfect rationality is no more attainable (and probably no more desirable) than perfect competition. But to move toward it is better than to move away from it. If the defenders of unrestricted persuasive advertising are content to rest their case on the ideal of consumer choice, a critic can too.

reliability, because the advertiser wants to build up repeat sales, and cannot afford to sell patently unsatisfactory goods. Admitting, for the sake of getting on, that unadvertised brands offer a greater opportunity for "hit-and-run" frauds, the difficulty with this contention is that the hope of continued custom is quite unrelated to the magnitude of persuasive advertising. Nothing more than information as to source is necessary for the consumer to be able to repeat a satisfactory purchase.[64]

Other values derive from the proposition that cheapness is not enough.[65] The buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker. All these may be illusions, but they cost money to create, and if the creators can recoup their outlay, who is the poorer? Among the many illusions which advertising can fashion are those of lavishness, refinement, security, and romance. Suppose the monetary cost of compounding a perfume is trivial; of what moment is this if the ads promise, and the buyer believes, that romance, even seduction, will follow its use? [66] The economist, whose dour lexicon defines as irrational any market behavior not dictated by a logical pecuniary calculus, may think it irrational to buy illusions; but there is a degree of that kind of irrationality even in economic man; and consuming man is full of it.

The taint of irrationality may be dispelled by asserting flatly that the utility of a good, that is, its capacity to satisfy wants, is measured exactly by what people will pay for it. If, as is undeniably the case, consumers will pay more for an advertised brand than for its unheralded duplicate, then consumers must get more satisfaction out of the advertised brand.[67] The nature of the satisfaction is of concern only to the moralist. Though this argument can easily be pushed to absurdity —suppose it was to the interest of the advertisers to consume half the national product in persuasion?—it seems plausible if it is based on the dogma of consumer autonomy. Then anyone who questions the untrammelled use of influence by the seller and its uncoerced acceptance by the buyer is at best a Puritan,[68] at worst a Fascist. The debate

64. See *post* p. 1185.

65. *See* BORDEN 654–61; WYAND, ECONOMICS OF CONSUMPTION 141–4 (1937).

66. "It is an illusion, to be sure, but it is the substance of hope without which life would be unbearable. . . ." *Id.* at 143, quoting a newspaper criticism of a work attacking the cosmetics industry.

67. See Knight, *Imperfect Competition*, 3 J. OF MARKETING 360, 364 (1939); but see Braithwaite, *Economic Effects of Advertising*, 38 ECON. J. 16, 25 (1928).

68. See Riesman, *Some Observations on Community Plans and Utopia*, 57 YALE L. J. 173, 188 (1947) for a brief and pointed analysis of the puritanical motivation of many attacks on lavish consumption.

seems to end in a defense of freedom, for the advertiser as well as for the consumer.[69]

But does the sovereign consumer have real freedom of choice? The first requisite of choice is an adequate presentation of alternatives.[70] The classical economists who enthroned the consumer never dreamed that he would make his decisions under a bombardment of stupefying symbols.[71] He should be informed, and willing to pay the necessary price for information. But the most charitable tabulations reveal relatively little information in advertising directed to consumers outside the classified columns and local announcements.[72] National advertising is dominated by appeals to sex, fear, emulation, and patriotism, regardless of the relevance of those drives to the transaction at hand. The purchase of many advertised articles, then, has a raw emotional origin.[73] Many others are compelled by the endless reiteration of the advertisers' imperative: eat lemons, drink milk, wear hats. Pseudo-information fills any gaps. It takes many forms. There is the bewildering manipulation of comparatives and superlatives: "No other soap washes cleaner"; "The world's most wanted pen." In the atomic age, precise scientific data are helpful. Bayer's Aspirin tells us that the tablet dissolves in two seconds. Whether the analgesic effect is then felt in one hour or two hours will no doubt be explained in time. Buick lists among its features such well-understood engineering terms as "Dynaflow Drive, Taper-thru Styling, Vibra-Shielded Ride, Hi-Poised Fire-ball Power." The reader, after ten minutes with a magazine or the radio, can select his own examples of the types of influence that are thought to move the sovereign consumer.

The foundation of free choice, to repeat, is an adequate presentation of alternatives. Admittedly, many choices, for example in politics or religion, are presented under a smoke screen of exaggeration and emotion. But there are usually at least two sides to the argument. The

69. The claim is often made that advertising promotes greater variety in goods than would otherwise exist, and thus adds to consumer satisfaction. This is somewhat nullified by an argument that advertising leads to greater standardization than would otherwise exist, thus adding to productive efficiency. The facts probably depend on the extent to which advertising is accompanied by the emergence of a few dominant producers. In any event, the point does not seem worth much attention, because there is no reason to believe that the operation of consumer choice through the price system would not evoke innovations at the rate desired by buyers.

70. On the necessity for consideration of alternatives as a basis for rational choice, see LASSWELL, WORLD POLITICS AND INSECURITY, c. I (1935); MANNHEIM, MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION, pt. IV (1940).

71. See Stocking, *Modern Advertising and Economic Theory*, 21 AM. ECON. REV. 43 (1931), criticized by Abramson, *id.* at 685.

72. *Supra* note 16.

73. ". . . trading on that range of human infirmities which blossom in devout observances and bear fruit in psychopathic wards." VEBLEN, ABSENTEE OWNERSHIP 307 n. (1923).

choice between one highly advertised dentifrice and another is, in important respects, no choice at all. It cannot register a decision to support or reject institutional arrangements which, as has been shown, contribute to monopolistic waste of resources; it cannot reflect a preference to get more or less for one's money, to take an illusion or leave it. It is only a choice between one illusion and another. That advertisers, despite their intramural rivalry, are aware that they stand on common ground, is shown by their united opposition to institutions which enlarge the consumer's alternatives. An instance is the forays and reprisals against the consumers' movement.[74]

The forces which counter advertising propaganda may be listed as follows. First, as an individual protest, is the sentiment described as "sales resistance," a compound of realism, skepticism, and apathy. Second is organized sales resistance, the pressure for reform by the slow-moving consumers' organizations. Third, most important economically, is the still small voice of the lower price tag on an unadvertised substitute. Fourth, the nub of the present discussion, comes the shaping of legal institutions, either to curb the excesses of advertising or to foster the second and third forces just listed. It is intended to discuss in a later article the enforcement of truth in advertising, as an indication that freedom to persuade and influence has its boundaries, and the possible use of antitrust, taxation, or other devices to set new boundaries. The law also has to take a stand when the use or misuse of advertising has created measurable values for the advertiser, and "another poaches upon the commercial magnetism of the symbol." How much protection will be given the advertiser against the poacher? The answer is sought in the law of trade-marks and trade names.

Summary

Before assessing the relevance of that body of doctrine to the good and bad in advertising, it may be desirable to summarize the conclusions reached thus far. Advertising has two main functions, to inform and to persuade. With qualifications that need not be repeated, persuasive advertising is, for the community as a whole, just a luxurious exercise in talking ourselves into spending our incomes. For the individual firm, however, it is a potent device to distinguish a product from its competitors, and to create a partial immunity from the chills and fevers of competition. The result of successful differentiation is higher prices than would otherwise prevail. The aim, not always achieved, is higher profits. Whether persuasive advertising enhances the total flow of goods by promoting cost reductions is disputable. Whether it swells the flow of investment by the lure of monopoly profits is doubtful.[75]

74. SORENSON, THE CONSUMER MOVEMENT, c. VII (1941).

75. At the beginning it was noted that advertising is one species of aggressive selling.

For the consumer who desires to get the most for his money, persuasive advertising displays a solid front of irrelevancy. The alternatives to what the advertisers offer are not adequately presented, and the choice among advertised products is loaded with a panoply of propaganda for which the buyer pays, whether he wants it or not. However, both buyer and seller profit from informative advertising. In a complex society, it is an indispensable adjunct to a free traffic in goods and services. The task before the courts in trade symbol cases, it may therefore be asserted, should be to pick out, from the tangle of claims, facts, and doctrines they are set to unravel, the threads of informative advertising, and to ignore the persuasive. The two functions are very much intertwined in trade symbols, how confusingly will appear when we try to separate them.

II. The Law of Trade Symbols Reoriented

> "We are nearly sure to go astray in any branch of the whole subject, as soon as we lose sight of the underlying principle that the wrong involved is diverting trade from the first user by misleading customers who mean to deal with him." L. Hand, J., in *S. C. Johnson & Son v. Johnson.*[76]

By trade symbols we mean the devices classified in law as trade-marks, trade names, or distinctive appearance of goods. In the marketer's vocabulary, branding and packaging embrace like operations. For present purposes, brand names, trade-marks, or trade names are functional equivalents, and any technical differences may be ignored.[77] They refer to words or phrases used in connection with goods and services to identify and to distinguish them. Non-verbal symbols used for the same purposes, such as colors, shapes, pictures, and designs,

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If a cataclysm abolished all admen, the same economic motives for differentiation would persist, and, it might be contended, the same results would be sought through other means, notably direct salesmanship. The enterpriser desiring to establish a brand preference would either have his hirelings knocking on every door, or he would make the retailer his tool by persuading him to increase his markup and concentrate his selling efforts on the higher-priced brand. Both methods, of course, are in extensive use, and account for a considerable share of selling costs. However, the fact that many tactics flourish together indicates, as the marketing experts avow, that they are not interchangeable. See Borden 81–7; Vaughan, Marketing and Advertising 111–15 (1928). Different devices sell different wares; and where several are useful they tend to be complementary rather than alternative. In any event, the careful greenkeeper does not spare the dandelions because crabgrass might grow in their place.

76. 116 F.2d 427, 429 (C.C.A. 2d 1940).

77. "There does exist a sharp distinction between trade-marks and trade names, although wherein it lies is not quite clear," Derenberg, Trade-Mark Protection and Unfair Trading 228 (1936). For a concise summary of the differences, see 3 Restatement, Torts § 716, comment *a*. Handler and Pickett, *Trade-Marks and Trade Names—An Analysis and Synthesis,* 30 Col. L. Rev. 168, 759 (1930), is definitive on the subject.

have no generally understood label. The word "appearance" when used herein is to be understood as referring to them.

Trade symbols are a species of advertising; their special characteristics are brevity and continuity in use, both of which are essential to their symbolic function. These characteristics make them easy to imitate, unlike most advertising, which may be diffuse and changing. Consequently, attempts to appropriate advertising values do not usually undertake to copy extensive advertising,[78] but only brand names or appearance. The occasions when the law will prevent or punish any such appropriations presumably have an important bearing on the value of advertising to the advertiser. But the role of the law should not be appraised in terms of the advertiser's interest alone. And from what has been said earlier, it is clear that a distinction must be attempted between the informative and persuasive functions of trade symbols.

The Informative Function

The informative job of trade symbols is conventionally considered to be identification of source; and it is this capacity which courts traditionally have protected.[79] If, by using *A*'s mark, *B* confuses buyers who mean to buy from *A* and rely on the mark to denote *A*'s goods, *A* is injured and can claim protection against the diversion of trade caused by *B*'s appropriation. Besides making *A* whole, the remedies given him are thought to help the misled consumer, whose own action for deceit is practically useless. The buyer should be able to assign praise or blame to the true source;[80] equally, if it adds to his satisfaction to buy goods of specific origin, he should be able to do so. These obvious interests correspond to those of the injured seller, and thus, because of its informational value, the function of identification is a clear case for protecting trade symbols against confusing imitation.

A difficulty arose when, with the growing complexity of distribution, it became apparent that many buyers who wanted goods with *A's* mark neither knew nor cared for *A's* identity. *A's* continuing interest against infringement of his mark was recognized in most cases, however, by altering the formula to include deception of buyers who expect the goods to come from a single though unknown source, or to come

78. Copyright protection is available for advertising material; but it is apparently not much used. See Borden, *Copyright of Advertising*, 35 Ky. L. J. 205 (1947); Note, 45 Harv. L. Rev. 542, 547 (1932).

79. The summary of doctrine and its rationale which follows is orthodox, and will not be documented in detail. For an authoritative, dispassionate statement, see 3 Restatement, Torts, c. 35.

80. The "source" or the "seller" does not have to be the manufacturer; it can be anyone in the chain of distribution who attaches a symbol to the product; see Isaacs, *Traffic in Trade-Symbols*, 44 Harv. L. Rev. 1210 (1931).

from the same source as earlier purchases bearing the same mark.[81] Although any reference to identification of origin is under these circumstances a makeweight, the symbol is still informative, if what the buyer wants is to be able to get the same thing he got before. Protection against imitation is in this case also important to the producer. The imitator's goods may be the same or even better than his; but they may also be inferior, and, under the present scheme of marketing largely in reliance on brand names, the disappointed expectations of buyers will presumably be vented against any article bearing the symbol. Thus the first user loses present and perhaps future sales.

Although few would leave a seller defenseless against such hazards, legal theory has presented a minor stumbling-block in the persistence of confusion of source as the only basis for relief. To eliminate the necessity of touching this often fictitious base, writers have urged explicit recognition for the function of trade symbols as designating a known article as well as a known source. Unfortunately, they have overstated the case by christening it the "guarantee" function of trade symbols.[82] Since the user of the symbol probably guarantees by it nothing more than his hope that the buyer will come back for more, the term smacks strongly of the ad-man's desire to create the illusion of a guarantee without in fact making more than the minimum warranty of merchantable quality.[83] This tendency is reflected in advertising of the "Lucky Strike *means* fine tobacco" type. In trade name law, Lucky Strike means a brand of cigarettes produced by the American Tobacco Co., and it may mean cigarettes like those the smoker bought yesterday, but it is not a grade designation or a certification mark.[84] Talk about the "guarantee" function of trade symbols is thus a somewhat overblown attempt to escape from the strict doctrinal requirement of a

81. See DERENBERG, TRADE-MARK PROTECTION AND UNFAIR TRADING 35–39 (1936) for examples.

82. *Id.* at 38; Schechter, *The Rational Basis of Trade-Mark Protection*, 40 HARV. L. REV. 813, 819, 824 (1927); *cf.* 2 CALLMANN, LAW OF UNFAIR COMPETITION AND TRADE-MARKS 808 (1945), hereafter cited as CALLMANN.

83. UNIFORM SALES ACT § 15(4); VOLD, SALES 462 (1931). Doubtless most sellers wish to have their symbols signify to buyers reliability, consistency, and other qualities. The point is that the symbol carries no such legal assurance. The user can "trade up" or "trade down" within a wide range of quality without risking any legal attack on his mark. *Cf.* Royal Baking Powder Co. v. Federal Trade Commission, 281 Fed. 744 (C.C.A. 2d 1922); Isaacs, *Traffic in Trade-Symbols*, 44 HARV. L. REV. 1210, 1215 (1931).

84. "When a cigarette manufacturer advises the public in strident tones that the X brand of cigarettes *means* fine tobacco, he finds many to imitate him. The air waves vibrate with the message of trade-mark owners who aver that the *A* product means quality, that the *B* product means a guaranteed life . . . or claims of similar import. Of course, they do not mean any of those things. They mean products emanating from a particular source." Digges, *Is Your Advertising Destroying Your Trademark?*, 35 T. M. REP. 51, 53 (1945).

known source; it should not obscure the legitimate informational value of labels pointing to an established reputation.[85]

The Persuasive Function

The informative functions of trade symbols outlined above, though they would be independently useful, rarely exist except as part of a larger campaign of persuasion to divert demand toward a particular advertised article. One of the problems of persuasion is the difficulty of concentrating it on a single brand.[86] A rhapsody to toothpaste is likely to benefit the entire cause of overpriced dental hygiene unless it is focused on the advertised product intensely enough to direct a purchase of that product rather than any other dentifrice.[87] Trade symbols are the distinguishing devices which set one brand of toothpaste apart from the other ninety-and-nine. They not only reach over the shoulders of the retailer;[88] they reach from a radio program on Sunday to a compulsive purchase on Friday. The function is still, in a sense, one of identification. But now it is identification not with source, nor with prior purchases. It is identification with advertising. If the advertising is successful, it directs demand to the article bearing the symbol. The symbol itself then becomes a vital link. It is a narrow bridge over which all the traffic powered by the advertising must pass. If an imitator can seize the bridge, he can collect the rich toll; and so it is commonplace that the more highly advertised is a branded product, the more attractive is its symbol to imitators.

With time, the symbol comes to be more than a conduit through which the persuasive power of the advertising is transmitted, and acquires a potency, a "commercial magnetism," of its own. One of the oldest of advertising techniques, the simple reiteration of the brand name, contributes to this result. Early advertising artists aspired to deface every natural monument with such forgotten symbols as "Sapolio." Their successors, no longer earthbound, write the bare syllables "Pepsi-Cola" in the sky. If those who crane their necks at the sky-writing are unable to blurt any name but Pepsi-Cola to the soda-

85. "Reputation" is admittedly an ambiguous term. It is used here to mean attraction to customers based on measurable differences over competitors in quality, variety, reliability, etc. This sort of reputation differentiates the seller's product just as much as does advertising. But the difference can be ended by like improvement on the part of competitors. Differentiation of this type is quite distinguishable from the situation where more and more advertising is the means of establishing or maintaining "reputation."

86. FREY, ADVERTISING 174 (1947); G. HOTCHKISS, AN OUTLINE OF ADVERTISING 203 (1935 ed.).

87. It may overshoot the mark. It is reported that successful Ipana campaigns have led to a considerable demand for pink tooth brushes. BURTT, PSYCHOLOGY OF ADVERTISING 67 (1938).

88. See Schechter, *The Rational Basis of Trade-Mark Protection*, 40 HARV. L. REV. 813, 818 (1927), ascribing this telling phrase to H. G. Wells.

clerk, the symbol obviously has commercial value. Even though its continued nurture requires continued outlays, the distillation of past displays and jingles and art exhibits into a word makes that word of great price, quite independently of the vats and alchemy that produce the drink.[89]

Some symbols have a ready-made potency, and the right to use one exclusively is also of value. Cautious restrictions by the courts on the appropriation of such self-starting symbols have given rise to subtle distinctions. Thus, words which connote desirable qualities in a product (called suggestive marks) are given protection if they informatively denote the source.[90] Such words may show a certain ingenuity,[91] like "Seventeen," [92] "Glamour" and "Mademoiselle" for a trio of magazines directed at young women, or they may fall into the category of what for want of a better term may be called honorific marks. These include such hoary items as "Blue Ribbon," "Gold Medal," "Premier," and "Acme." [93] But if the symbol crosses a shadowy line and becomes descriptive rather than suggestive, it may not ordinarily be monopolized. Common words describing the product or its performance, like "Sta-Down" for girdles,[94] should be free to all for information and explanation. However, if the user can show that a descriptive term has in fact come to signify his product and his alone, he is then blessed with a valid trade name. The same exception [95] limits the exclusive appropriation of elements of appearance, a miscellaneous and vast congeries of visually attractive or memorable devices such as striking pictures,

89. In American Safety Razor Corp. v. International Safety Razor Corp, 26 F.2d 108 (D.N.J. 1928), the plaintiff stated that it had paid approximately $8,000,000 over the value of physical assets for the trade-marks "Gem," "Ever-Ready," and "Star" for razors and blades. Plaintiff, seeking relief against a competing razor blade manufacturer who advertised in a supposedly deceptive manner that his blades would fit plaintiff's razors, continued to advertise and sell all three brands, at different prices though all the blades were identical. Neither this fact nor the common source was disclosed to the public. Relief was denied on account of unclean hands. *Rev'd,* 34 F.2d 445 (C.C.A. 3d 1929).

90. 2 CALLMANN § 71.2.

91. Like slogans or catch-phrases, which may also be given trade name protection if they come to signify source. In Lever Bros. v. Nobio Products, 103 F.2d 917 (C.C.P.A. 1939), the mark "Nobio" for a deodorant was denied registration on the ground that Lever Bros. (with $10,000,000 of advertising in ten years) had so associated "B.O." with their Lifebuoy soap that "the term 'B.O.' serves to indicate origin in appellant." This is perhaps an extreme case.

92. Protected in Hanson v. Triangle Publications, 163 F.2d 74 (C.C.A. 8th 1947); Triangle Publications v. Rohrlich, 167 F.2d 969 (C.C.A. 2d 1948) (one judge dissenting in each case).

93. Marks of this sort are considered weak, and get only a narrow range of protection; see 2 CALLMANN § 82.1 (1); note 123 *infra.*

94. The H. & W. Co., 23 T. M. REP. 39 (Comm. Pat. 1932). This mark apparently derived from the frequent fallacy that misspelling cures descriptiveness. See Pemberton, *The Futility of Misspelled Trade-Marks,* 28 T. M. BULL. (N.S.) 42 (1933).

95. "Secondary meaning" is the unenlightening technical term; see 3 RESTATEMENT, TORTS § 716, comment *b.*

easily identifiable designs, or pleasant combinations of colors. These, when part of the article or its container, are often seized upon because they are thought to be inherently effective in drawing the buyer to the product. If, however, they also indicate the source, they may be protected against confusing imitation.[96]

To recapitulate, we have now seen that trade symbols may serve as a bridge between advertising and purchase, and that they may themselves be the vehicle of persuasion, either because of extensive repetition and embellishment apart from their use on goods, or because the advertiser has selected and somehow appropriated to his exclusive use a symbol which independently predisposes the customer to buy.[97] These characteristics are usually thoroughly intermingled; in any combination they add up to a distinct category which should be called the persuasive advertising function of trade symbols. Others have simply labelled it the advertising function,[98] but we will call it the persuasive function, in contrast to the informative or identification function. The latter comprehends the accepted legal doctrine of identification of source, and the emerging doctrine of identification of

96. But if the element of appearance in question contributes to the function of the article, the imitator need not give it up, provided he takes reasonable steps to avoid deception. *Id.* at §§ 741–2.

97. Boulding suggests that the "principle of minimum differentiation," first propounded by Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929), makes trade symbols valuable also as the *means of differentiation:*

> "The general rule for any new manufacturer coming into an industry is 'make your products as like the existing products as you can without destroying the differences.' It explains why all automobiles are so much alike, and why no manufacturer dares make a car in which a tall hat can be worn comfortably. It even explains why Methodists, Baptists, and even Quakers are so much alike, and tend to get even more alike, for if one church is to attract the adherents of another, it must become more like the other but not so much alike that no one can tell the difference. It explains the importance of brand names in commercial, social, and even religious life, for the best way of making a product as much like other products as possible without destroying the differences is to make it physically similar to the others but to *call* it something different, and to try to build up by advertising a preference in the mind of the buyer for the *name* of the product. Thus it also explains the importance of advertising, for a great part of advertising is little more than an attempt to establish a brand name in the minds of the public."

BOULDING, ECONOMIC ANALYSIS 601 (1941).

98. 2 CALLMANN § 65.3. "Marks frequently have great advertising value though the articles to which they refer have little or none, the mark being the principal, or perhaps, sole asset of the business it supports." *Id.* at 813. Callmann has the great merit of avowing, almost alone among trademark specialists, that the persuasive advertising function of trade symbols is significant. Compare the position of Mr. E. S. Rogers, an acknowledged leader of the trade-mark bar, whose long advocacy of extreme protection for trade symbols has been almost entirely in the name of shielding the identification function against "dirty tricks." See Rogers, Book Review, 39 YALE L. J. 297, 301 (1929); Rogers, *Freedom and Trade-Marks*, 34 T. M. REP. 55 (1944).

goods (misnamed the guarantee function), which serve generally the same purposes as other informative advertising.[99]

From what has been said earlier about the economic waste and distortion of consumer choice growing out of large-scale persuasive advertising, it should be clear that the persuasive function of trade symbols is of dubious social utility. There seems little reason why the courts should recognize or protect interests deriving from it.

But a theoretical separation into black and white does not keep the real world from remaining a confused gray. The same trade symbol usually serves both functions—the informative and the persuasive. Can they be disentangled? [100] Is there any recognition in the cases of the persuasive value of trade symbols? It seems to be conventional to recite the total advertising expenditures of the parties.[101] These figures, however, raise no explicit issues.[102] To see whether the courts

99. Other functions may be briefly noted. Public clamor for a branded product frees the manufacturer or distributor to some extent from dependence on the retailer, who otherwise can promote whatever brand is most profitable to him. This is an important strategic consideration which does not affect the present argument. Also, the manufacturer, under the so-called Fair Trade laws, can enforce resale price maintenance of a trade-marked article. The impetus to fix resale prices, however, comes largely from independent retailers. See Shulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 YALE L. J. 607, 615 (1940). A trade symbol may also be "the focus of good public relations fostered to avoid taxation and public regulation"; see Note, 41 ILL. L. REV. 679, 682 (1947).

100. "A trade-mark, in the contemplation of the law, means a particular article or articles originating from a single source.

"In an advertising sense, a trade-mark represents the residuary value in good-will resulting from the expenditure of the advertising dollar—a symbol of expectancy of continuing sales for the product to which it is affixed. . . .

"The *advertising* conception of a trade-mark and the *law's* conception of a trade-mark, at first blush, might appear to be in complete harmony with each other. Nothing could be further from the truth. In practical application they may be continuously at war." Digges, *Is Your Advertising Destroying Your Trade-Mark?*, 35 T. M. REP. 51 (1945).

101. The amounts are usually expressed in a lump sum covering outlays over many years. In the price discrimination case against Goodyear for selling tires to Sears Roebuck, bearing Sears' brand, at a lower price than the identical tires were sold to dealers under the Goodyear brand, Goodyear Tire & Rubber Co. v. Federal Trade Commission, 101 F.2d 620 (C.C.A. 6th 1939), Goodyear argued before the Commission in defense of such cumulated figures: "We believe that the . . . total amount expended in respect of advertising for the full history of the company [$72,000,000] is relevant as giving some measure of that value which is given to Goodyear dealers in the sale of Goodyear tires and not to Sears Roebuck in the sale of tires to Sears Roebuck." Quoted in HAMILTON AND ASSOCIATES, PRICE AND PRICE POLICIES 103 n. (1938). Sears, it was further argued, got "an aggregation of rubber and fabric and nothing more"; the dealers (at the higher price) got "a tangible and an intangible. The tangible is the material content of the tires. The intangible is the right to sell the tire under the Goodyear trademark." Quoted in Borchardt, *Are Trademarks an Antitrust Problem?* 31 GEO. L. J. 245, 258 (1943).

102. Except where an attempt is being made to establish secondary meaning, see note 95, *supra*, in an otherwise non-exclusive symbol. There, expenditures on advertising are pertinent to show the plaintiff's effort to associate the symbol and the source in the public

are sympathetic to values created by persuasive advertising, we should look for a situation in which the functions are not intermingled, and in which protection is demanded for persuasive values alone.

Dilution

The clearest, most candid, and most far-reaching claim on behalf of persuasive values is summed up in the word dilution. The dilution theory [103] is based on the fact that the more widely a symbol is used, the less effective it will be for any one user. The color red, for example, may be more striking on a package than other colors, but if half the boxes on the super-market shelf are red, its power is thereby dissipated.[104] The words "Gold Medal" may once have had considerable power, but each time a new commodity comes along and christens itself Gold Medal, all the other Gold Medals lose part of their magic.[105] Thus, the profit potential of a symbol may be diluted by several types of conduct that would not jeopardize its informative value and give rise to an actionable wrong for confusing buyers as to source. If an advertiser has a persuasive symbol, he has stored up in a number of persons' brain cells some degree of desire to buy goods bearing the symbol. No galvanometer has been devised to measure that potential, or the extent of its dissipation by the use of the symbol on another's

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mind. See cases collected 150 A.L.R. 1090 (1944). But "large expenditures for advertising do not compel a conclusion that the task has been accomplished." General Time Instruments Corp. v. United States Time Corp., 165 F.2d 853, 855 (C.C.A. 2d 1948). *But cf.* Hilson Co. v. Foster, 80 F. 896, 897 (C.C.S.D.N.Y. 1897) ("The money invested in advertising is as much a part of the business as if invested in buildings, or machinery, and a rival in business has no more right to use the one than the other"); Stork Restaurant v. Sahati, 166 F.2d 348, 356 (C.C.A. 9th 1948).

103. So named in a German case, involving identical marks on mouthwash and hardware; introduced into American discussion by Schechter, *The Rational Basis of Trade-Mark Protection,* 40 HARV. L. REV. 813, 831 (1927); see Wolff, *Non-Competing Goods in Trademark Law,* 37 COL. L. REV. 582, 588, 601 (1937).

104. For recent cases in which exclusive use of the color red has been sought against a competitor, see: Mishawaka Rubber & Woolen Mfg. Co. v. Panther-Panco Rubber Co., 153 F.2d 662 (C.C.A. 1st 1946) (red circle on rubber footwear, narrowly protected); James Heddon's Sons v. Millsite Steel & Wire Works, 128 F.2d 6 (C.C.A. 6th 1942), *cert. denied,* 317 U.S. 674 (1942) (red line around fish lure box, not protected); G. H. Mumm Champagne v. Eastern Wine Corp., 142 F.2d 499 (C.C.A. 2d 1944), *cert. denied,* 323 U.S. 715 (1944) (diagonal red band on champagne label, protected); Radio Corp. of America v. Decca Records, 51 F. Supp. 493 (S.D.N.Y. 1943) (red center of phonograph records, not protected).

105. *Cf.* France Milling Co. v. Washburn-Crosby Co., 7 F.2d 304 (C.C.A. 2d 1925), *cert. denied,* 268 U..S. 706 (1925). France used "Gold Medal" on prepared pancake flours, Washburn-Crosby on wheat flour. Held: each would be protected only in the precise field occupied, because of the non-distinctive character of the mark, which had been registered more than 60 times. Gold Medal, a heavily advertised wheat flour, is nevertheless able to maintain a substantial price differential over other brands of this rather uniform product; see BORDEN 585.

goods, but if the different uses impinge on the same buyers, the effect is much feared. What the proponents of the dilution theory argue is that it should be given equal protection with the interest against confusion. The theory's most vigorous living champion is Callmann, who in his *Unfair Competition and Trade Marks* argues forcefully for the proposition that courts are in effect doing this, though in a roundabout way.[106]

The conspicuous case in which protection against dilution is said to be granted, in fact though not in theory, is in the use of like symbols on unlike goods.[107] If our assumption of the potency of a persuasive symbol is correct, it is easy to see why a seller of suspenders might hope to garner some unearned increment by christening them "Lucky Strike." It is equally easy to see that freedom to use a highly differentiated mark on any goods but the original user's product would dilute the mark quite disastrously. But for a long time, the courts found distressingly logical grounds for refusing relief. How could there be unfair competition when there was no competition? How could the defendant's goods be passed off for those of the plaintiff, if the plaintiff did not make the type of article in question? [108]

But the life of the law is not logic, and in the roaring twenties a new rationale was developed. Assuming that a defendant who would jeopardize the plaintiff's advertising budget was in all probability a shady character, the courts decided that, if the article bearing the copied symbol was one which might reasonably be expected to come from the plaintiff, the defendant's use of the symbol unfairly jeopardized the plaintiff's reputation.[109] In a famous passage, Judge Learned Hand wrote,

> ". . . it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the

106. 2 CALLMANN § 84.2. In a recent article Dr. Callmann develops the thesis that the interest of a trade symbol user against dilution is not part of the law of unfair competition, since neither competition nor confusion is involved; it is a property interest. Callmann, *Unfair Competition Without Competition? The Importance of the Property Concept in the Law of Trade-Marks,* 95 U. OF PA. L. REV. 443 (1947).

107. 2 CALLMANN § 84.2(a). The many cases are collected in 148 A.L.R. 12 (1944).

108. Borden Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510 (C.C.A. 7th 1912); see Wolff, *Non-Competing Goods in Trademark Law,* 37 COL. L. REV. 582, 590 (1937). This view may persist in some states; see cases collected 148 A.L.R. 12, 19 (1944).

109. Aunt Jemima Mills Co. v. Rigney & Co., 247 Fed. 407 (C.C.A. 2d 1917), *cert. denied,* 245 U.S. 672 (1918) (pancake flour and syrup); Vogue Co. v. Thompson-Hudson Co., 300 Fed. 509 (C.C.A. 6th 1924), *cert. denied,* 273 U.S. 706 (1926) (woman's magazine and hats); Wall v. Rolls-Royce of America, 4 F.2d 333 (C.C.A. 3d 1925) (automobiles and radio tubes); Lukens, *Application of the Principles of Unfair Competition to Cases of Dissimilar Products,* 75 U. OF PA. L. REV. 197 (1927).

> goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask." [110]

An additional basis for relief, characteristic of the era, was found in the plaintiff's "natural" tendency to expand.[111] His growth, if it took in the defendant's field, might be stunted by the unavailability of his symbol. This ground was certainly no broader than the interest in reputation, and has been severely limited in late years.[112]

Either argument required that the two products, though dissimilar, be "related";[113] for if they occupied totally different spheres of the economy, the reputation of the borrower could not affect that of the originator of the symbol, nor could the latter be expected to expand into the imitator's totally different market. Though the necessary degree of relation has been found, to cite only recent examples, between a radio station and a printing company,[114] between corsets and cosmetics,[115] and between shoes and watches,[116] the recent trend in appellate courts has been to restrict the doctrine.[117] In 1934, Judge Learned Hand suggested the gulf between steam-shovels and lipsticks

110. Yale Electric Corp. v. Robertson, 26 F.2d 972, 974 (C.C.A. 2d 1928).

111. Peninsular Chemical Co. v. Levinson, 247 Fed. 658 (C.C.A. 6th 1917); William Waltke & Co. v. Geo. H. Schafer & Co., 263 Fed. 650 (App. D. C. 1920); Wilcox & White Co. v. Leiser, 276 Fed. 445 (S.D.N.Y. 1918). Compare the cognate interest in geographical expansion, Sweet Sixteen Co. v. Sweet "16" Shop, Inc., 15 F.2d 920 (C.C.A. 8th 1926); cases collected 148 A.L.R. 12, 117 (1944).

112. S. C. Johnson & Son v. Johnson, 116 F.2d 427 (C.C.A. 2d 1940); Dwinell-Wright Co. v. White House Milk Co., 132 F.2d 822 (C.C.A. 2d 1943).

113. See 3 RESTATEMENT, TORTS § 730, comment *b*: "The interest [in a trade-mark or trade name] is not protected against the use of a similar designation for any goods, services or business. It is protected only within the limits fixed by the likelihood of confusion of prospective purchasers. The issue in each case is whether the goods, service or businesses . . . are sufficiently related so that the alleged infringement would subject the goodwill and reputation of the other's trade-mark or trade name to the hazards of the actor's business." This passage is quoted as a reminder that the test for "relation" is the likelihood of confusion. Probable confusion is the starting-point in the great majority of the cases, whether they concern non-competing or competing goods. In the discussion above the nature of the interest protected against confusion is emphasized; the content of "probable confusion" is the subject of the next section.

114. Bamberger Broadcasting Service, Inc. v. Orloff, 44 F. Supp. 904 (S.D.N.Y. 1942).

115. Lady Esther, Ltd. v. Lady Esther Corset Shoppe, 317 Ill.App. 451, 46 N.E.2d 165 (1943) (alternative ground to confusion that "the good-will of plaintiff, which it had built up at great expense over a period of years, would be whittled away").

116. Bulova Watch Co. v. Stolzberg, 69 F. Supp. 543 (D. Mass. 1947) (dilution and injury to reputation both stated as grounds for relief).

117. Zlinkoff, *Monopoly Versus Competition: Significant Trends in Patent, Anti-Trust, Trade-Mark and Unfair Competition Suits*, 53 YALE L. J. 514, 538–41 (1944).

as the degree of remoteness necessary to bar relief;[118] in 1943 he was more than doubtful about protecting toy banks selling for fifty-nine cents and up against other banks retailing for ten cents.[119]

As a matter of fact, no plausible interpretation of the reputation rationale would adequately serve the interest against dilution. The damage is done by the mere use of the symbol by another, regardless of whether the advertiser's reputation is likely to be tarnished; he may not even have a reputation, except in the sense of the revealing maxim, "Repetition is reputation." Callmann scoffs at the reasoning of the cases as they stand, because the finding of a probable connection in the public mind between the businesses in question is occasionally unrealistic; such cases represent, he thinks, a refusal to face the dilution issue squarely.[120] One may readily concede the point; but if the dilution theory is approached by the courts with conceptions about the social utility of persuasive advertising at all like those expressed here, no great difference should be expected in the outcome of future cases.[121] Once the dilution argument is flatly rejected, a critical examination of the present theory of protecting plaintiff's reputation may produce clearer results. Judge Frank has already pointed out that the defendant ought to have an opportunity to prove that he will not harm the plaintiff's fair name.[122] Good repute may be beyond price; but it is not beyond cross-examination.[123]

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118. See L. E. Waterman Co. v. Gordon, 72 F.2d 272, 273 (C.C.A. 2d 1934).

119. Durable Toy & Novelty Corp. v. J. Chein & Co., 133 F.2d 853 (C.C.A. 2d 1943), *cert. denied*, 320 U.S. 211 (1943) (weakness of mark and indifference of buyers to source also grounds for refusing relief).

120. 2 CALLMANN 1337.

121. Except in Massachusetts, where a recent statute declares that:

> "Likelihood of injury to business reputation *or of dilution of the distinctive quality of a trade name* or trade-mark shall be a ground for injunctive relief in cases of trade-mark infringement or unfair competition, notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services."

ANN. LAWS MASS., c. 110, § 7A (Supp. 1947) (emphasis supplied).

This statute may have been intended to alter the supposed Massachusetts rule denying relief in non-competing goods cases. Hub Dress Mfg. Co. v. Rottenberg, 237 Mass. 281, 129 N.E. 442 (1921); see National Fruit Product Co. v. Dwinell-Wright Co., 47 F. Supp. 499, 509 (D.Mass. 1942). But it clearly goes much further.

122. Standard Brands, Inc. v. Smidler, 151 F.2d 34, 42 (C.C.A. 2d 1945) (concurring opinion).

123. An interesting cross-current in the non-competing goods cases is the weight given the distinctiveness of the symbol. Commonplace or honorific marks, being widely used, cannot claim wide protection from use on non-competing goods. If a man calls his beer "Arrow," he cannot complain if another calls his liqueurs "Arrow" too, when the mark has been registered in the Patent Office ninety-eight times. Arrow Distilleries v. Globe Brewing Co., 117 F.2d 347 (C.C.A. 4th 1941). But the Eastman Kodak Co. can probably prevent anyone from calling almost anything Kodak. Without attempting to analyze the reasons, which may only reflect the likelihood of strong association between a distinctive mark

Confusion

Though the dilution theory, as such, has made little headway in the case of non-competing goods,[124] there remains the equally important possibility of dilution among competing goods by the use of imitative symbols which drain off the advertiser's selling potential without falling afoul of conventional canons of confusion of source. For example, the manufacturers of Camel cigarettes might be quite exercised if a Dromedary brand appeared on the market, but they would be hard put to prove that buyers were confused. And likely confusion of customers, as we have seen, is the universal judicial touchstone in trade name cases. But once the likelihood of confusion has been established, further inquiry into the significance of the mark to the buying public is rare.[125] Consequently, a decree for plaintiff based on confusing similarity protects alike the symbol as information and the same symbol as vehicle for persuasion. This is unavoidable, even though, as may often be the case with a highly advertised symbol, its identification function is negligible, compared with the dominant association between symbol and persuasive advertising.[126]

Therefore, a promising line of indirect attack for the proponents of the dilution theory is to exploit the considerable confusion about confusion. A brief and satisfactory statement of the rule is as follows:

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and the source, we can admit that deference to fanciful marks carries along in its wake protection of any persuasive advertising value the symbol may have. Therefore a great deal of persuasive value can be built up in a distinctive mark, accompanied by a broad area of protection.

124. There are probably not more than a dozen cases in which it has been explicitly mentioned; and where it was made a basis for decision, "no cases have been found in which there was not present an element of confusion." Annotation, 148 A.L.R. 12, 77 (1944); cases collected *id.* at 74–7). Recent cases discussing dilution include Bulova Watch Co. v. Stolzberg, 69 F. Supp. 543 (D. Mass. 1947) (dilution alternative ground for relief; note 107 *supra*); Pro-phy-lac-tic Brush Co. v. Jordan Marsh Co., 165 F.2d 549 (C.C.A. 1st 1948) (dilution theory inapplicable to competing goods; note 155 *infra*); Stork Restaurant, Inc. v. Sahati, 166 F.2d 348, 356 (C.C.A. 9th 1948) (dilution theory, described as a "corollary" to confusion of source, applied in case of restaurants in different cities). The run of cases continues to emphasize likely confusion of source leading to possible injury to plaintiff's reputation. *But cf.* the Mass. statute, note 121 *supra*.

125. See note 136 *infra*.

126. See 2 CALLMANN 813: "The function of indicating origin, however, is indispensable and is a necessary aid to the advertising function. . . . The function of indicating origin is merely auxiliary to the advertising function and has no independent significance." It was doubtless this fact that led Professor Chamberlin to urge that the public interest would be best served by permitting unlimited confusion through imitation, so that it would be almost impossible to accomplish advertising differentiation. He would thus scrap the identification function, leaving the public to be protected against debased imitations by standard grades, etc. CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION 246–50, App. E, "Some Arguments in Favor of Trade-Mark Infringement and 'Unfair Trading'" (5th ed. 1946). For the moment we may reject this forthright suggestion on the ground that the alternatives he proposes are not in existence or in prospect.

"Plaintiff need show only that the name adopted by defendants is so similar to its trade-mark as to be likely to cause confusion among *reasonably careful purchasers.*" [127] But its application, like that of many rules, is hedged with qualifications and admonitions. Since most trade name proceedings are in equity, judges have to make the decision whether the likelihood of deception exists. If identical symbols are used on identical goods, the decision is easy. If there is evidence of actual instances of confusion, the decision is easy.[128] If the defendant's intention to copy the plaintiff's symbol is proved, the court can wryly assume that his effort was successful, and again the decision is easy.[129] Most cases, however, are not so easy. The judge has to try to put himself in the position of the customer, and to decide whether he, as a customer, would be likely to be deceived. But what is the position of the customer in a world ruled by advertising? From the time he picks up his morning paper until he switches off his radio at bedtime he is bombarded with literally thousands of trade symbols. He goes to work in a public conveyance papered with them. His way is lined with billboards and shop windows proclaiming them. He checks the date from an advertiser's calendar, winnows a harvest of leaflets from his mail, closes the window against a sound truck, and perhaps escapes for a few hours. Then on his return home he exposes himself to a stupefying flow of persuasion from the radio. When he ventures into a store to perform the act of buying, myriads of symbols, attached to exhortations, pleas, reminders, and threats, stir uneasily in his subconscious, while hundreds more dance before his eyes from packages, posters, and animated displays. Is he confused? Undoubtedly. The judge comparing in isolation, now "Chateau Martin" with "Chateau Montay" wine,[130] now "LaTouraine" with "Lorraine" coffee,[131] cannot reproduce the murky totality of a trip to the market.[132] No more can the psychologist with his laboratory tests for confusion.[133]

We have, then, as the chief actor in trade symbol dramas a synthetic figure, the deceived buyer. Since he is but a figment, those interested

127. LaTouraine Coffee Co. v. Lorraine Coffee Co., 157 F.2d 115, 117 (C.C.A. 2d 1946), *cert. denied,* 329 U.S. 771 (1946). Emphasis supplied.

128. See 2 NIMS, UNFAIR COMPETITION AND TRADE-MARKS § 335 (4th ed. 1947).

129. *Id.* at § 355*a*. Defendant may rebut the prima facie case if he can. My-T-Fine Corp. v. Samuels, 69 F.2d 76, 77 (C.C.A. 2d 1934).

130. Eastern Wine Corp. v. Winslow-Warren Ltd., 137 F.2d 955 (C.C.A. 2d 1943), *cert. denied* 320 U.S. 758 (1943) (*held,* confusion unlikely).

131. LaTouraine Coffee Co. v. Lorraine Coffee Co., 157 F.2d 115 (C.C.A. 2d 1946), *cert. denied,* 329 U.S. 771 (1946) (confusion likely; one judge dissenting).

132. "We can only contemplate, speculate and weigh the probabilities of deception arising from the similarities and conclude as our, and the District Judge's, reactions persuade us." Colburn v. Puritan Mills, Inc., 108 F.2d 377, 378 (C.C.A. 7th 1939).

133. See Jenkins, *Additional Variables in Trade-Name Confusion,* 35 PSYCH. BULL. 649 (1938).

in advertising values can perhaps reshape him to suit the commercial drive for freedom from dilution. The portrait of the imaginary consumer given above suggests that he is indeed confused, but by the very multiplicity of symbols.[134] To this extent the drive to differentiate is self-defeating. The attempt to bend the rubric of confusion to the uses of dilution can, however, exploit the babel of brands. First, it is implicitly assumed that the buyer always aspires to follow the lead of the advertiser, and to have his hand guided in the supermarket. One may pause to doubt the universality of the assumption. There must be many instances where complete indifference reigns.[135] The buyer cannot be deceptively confused if he does not care whether he gets Thinsies or Thins. No doubt the difficulty of establishing the degree of reliance on brands accounts for the fact that the courts do not often stop to consider this factor, though there is persuasive authority for doing so.[136]

Returning to the attempt to expand the concept of confusion, the next step, after hypothesizing that the consumer cares, is to emphasize,

134. The number of desires which the buyer can connect with a known symbol and retain to the point of purchase is miserably finite; but of the making of symbols there is no end. Nims estimates 280,000-300,000 unexpired trade-mark registrations in the Patent Office. 1 NIMS, UNFAIR COMPETITION AND TRADE-MARKS v (4th ed. 1947). These constitute only a fraction of the total number of brands of goods. In a single urban market, Milwaukee, there were 148 brands of packaged coffee, 29 brands of cigarettes, 87 of pipe tobacco, 99 of toothpaste, 100 of shaving cream, etc. BORDEN 633-6. In each field, however, there was likely to be considerable concentration among a few leading brands. See BORDEN 637-9.

135. *Cf.* Aldous Huxley, commenting on the difficulties of successful ethical or political propaganda compared to the ease of advertising: "A great deal of advertising is concerned with matters of no importance whatsoever. Thus I need soap; but it makes not the smallest difference to me whether I buy soap manufactured by *X* or soap manufactured by *Y*. This being so, I can allow myself to be influenced in my choice by such entirely irrelevant considerations as the sex appeal of the girl who smiles so alluringly from *X*'s posters, or the puns on *Y*'s and his comic drawings. In many cases of course I do not need the commodity at all. . . . In these cases commercial propaganda is an invitation to give in to a natural or acquired craving. In no circumstances does it ever call upon the reader to resist temptation; always it begs him to succumb. It is not very difficult to persuade people to do what they are all longing to do." Huxley, *Notes on Propaganda*, 174 HARPER'S 32 (1937).

136. Durable Toy & Novelty Corp. v. J. Chein & Co., 133 F.2d 853 (C.C.A. 2d 1943), *cert. denied*, 320 U.S. 211 (1943) (indifference of buyers to source of trifling object one ground for denying relief). 2 CALLMANN 1124 asserts that it is of no importance whether the public cares about the source. This position is of course consistent with his view that the plaintiff should be protected in trying to build up persuasive values. Compare the requirement for protection against deceptive imitation of appearance of goods, an instance of secondary meaning: ". . . it is an absolute condition to any relief whatever that the plaintiff in such cases show that the appearance of his wares has in fact come to mean that some particular person—the plaintiff may not be individually known—makes them, and that the public cares who does make them. . . ." Crescent Tool Co. v. Kilborn & Bishop Co., 247 Fed. 299, 300 (C.C.A. 2d 1917); Sinko v. Snow-Craggs Corp., 105 F.2d 450 (C.C.A. 7th 1939).

rather than minimize, the perils of choice in a world full of dishonest tradesmen bent on substituting something just as good. Finally, the courts are urged to an extreme solicitude for the buyer's frailties.[137] This requires shifting the emphasis from the "reasonably careful purchaser" to insistence that

> "The law is not made for the protection of experts, but for the public—that vast multitude, which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." [138]

In trade symbol cases, the unwary purchaser is scarcely a worthy object for judicial solicitude. He is a convenient front for advertisers who hope to keep a clear channel for their persuasive messages, free from the signals of later comers. The difficulty of preventing such interference is no reason for relaxing the standard of the "reasonably careful purchaser." Reasonable care in this field implies a buyer who at most needs to be able to read large print,[139] distinguish primary colors, and say what he wants. The figure of the unwary, casual, incautious, unsuspecting purchaser [140] suggests conclusions which those who favor him could scarcely confess: that people are not very bright, and that a good deal of persuasion cancels out, leaving consumers (bright or not) indifferent as to either origin or advertising of many goods. Communication free of confusion needs to be fostered only for sellers who give and buyers who seek information.

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137. The attitude summarized here is well illustrated by the discussions of confusing similarity in the leading treatises; see 2 CALLMANN 1127–46; 2 NIMS, UNFAIR COMPETITION AND TRADE-MARKS 1024–38 (4th ed. 1947), both emphasizing "the ordinary purchaser" as the standard. *Cf.* Note, *'Confusion' in Trade Name Infringement*, 41 ILL. L. REV. 679 (1947).

138. Coxe, J., in Florence Mfg. Co. v. J. C. Dowd & Co. 178 Fed. 73, 75 (C.C.A. 2d 1910), a statement so admired by Nims, *op. cit. supra* note 137, that it appears on his title-page. I do not intend to suggest that the qualifications of the buyer—whether he is an expert or an aborigine—are irrelevant. All that is urged is that the depressing of the judicial standard from "reasonable" to "ordinary" to "ignorant" is unwise. *See* California Fruit Growers Exchange v. Sunkist Baking Co., 166 F.2d 971 (C.C.A. 7th 1947), in which Minton, J., said, "We cannot believe that anyone whose I.Q. is high enough to be regarded by the law would ever be confused or would be likely to be confused in the purchase of a loaf of bread branded as 'Sunkist' because someone else sold fruits and vegetables under that name." *Id.* at 973.

139. In Hi-Land Dairyman's Association v. Cloverleaf Dairy, 107 Utah 68, 151 P.2d 710 (1944), the defendant adopted the general color scheme and appearance of plaintiff's milk container; the brand names etc. were quite distinguishable. The court held plaintiff entitled to an injunction, because of confusion of "ordinary purchasers," citing a witness who testified, "I don't go to a grocery store to read". *Id.* at 76, 151 P.2d at 714.

140. For catalogues of adjectives characterizing purchasers, see references cited note 137 *supra*.

Goodwill and Misappropriation

We have now dealt with two major currents of trade name doctrine which concern persuasive values: first, the dilution theory, especially as applied to non-competing goods; second, the tests for confusion of source of competing goods. In both areas it may be said that avowed protection of persuasive values is infrequently given. Also brought to bear on the tangle of persuasive and informative functions are the concepts of goodwill as property, and the abortive interest against misappropriation of intangible values.

Goodwill is a term of quite ambiguous reference, with many definitions that have improved little on Lord Eldon's terse dictum, ". . . the probability that the old customers will resort to the old place." [141] Its pertinence here is the frequent identification of trade symbol values with goodwill, and of goodwill with property.[142] To refine this crude syllogism we must also try to refine Lord Eldon. Perhaps it may be agreed for present purposes that goodwill represents a capitalized appraisal of profit potentialities not allocable to tangible assets. The persuasive magnetism of a trade symbol is obviously such an intangible, often of great commercial value. But the recognition in business circles of that value is only partially a prediction whether the courts will protect it against various forms of encroachment.[143] As the differential profit advantage of a firm, goodwill may arise from superior efficiency, from convenience, from confidence, from nepotistic connections, from persuasive advertising, from successful infringement of a persuasive symbol, from threats of violence, and so on into a range of conduct entirely beyond the pale of the law.[144] Furthermore, the existence of goodwill may be at issue in a variety of contexts—bankruptcy, stock valuation, taxation.[145] The interests against confusion of source and harm to reputation are generally protected; they may there-

141. Cruttwell v. Lye, 17 Ves. 335, 346 (1810).

142. *Cf.* Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 194 (1936); *but cf.* Premier-Pabst Corp. v. Elm City Brewing Co., 9 F. Supp. 754 (D. Conn. 1935). A collection of authorities referring to trade symbols as variously creating, reflecting, or embodying goodwill may be found in 1 NIMS, UNFAIR COMPETITION AND TRADE-MARKS 73-85 (4th ed. 1947). For a trenchant attack on the view that trade symbols must be protected because they are property, see Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COL. L. REV. 809, 814 (1935); *but cf.* Callmann, *Unfair Competition Without Competition?*, 95 U. OF PA. L. REV. 443 (1947).

143. "Undoubtedly, the exclusive right to use a certain collocation of words or signs to designate a certain class of goods may have a considerable money value as an advertisement, but the fact that a right would have a money value, if it existed, is not a conclusive reason for recognizing the right. * * * When the common-law developed the doctrine of trade-marks and trade names, it was not creating a property in advertisements more absolute than it would have allowed the author of Paradise Lost. . . ." Holmes, J., in Chadwick v. Covell, 151 Mass. 190, 193, 23 N.E. 1068, 1069 (1890).

144. *Cf.* Wright, *The Nature and Basis of Legal Goodwill*, 24 ILL. L. REV. 20 (1929).

145. *Id.* at 22.

fore be called goodwill and property if it is convenient to do so. The fact that a probate court might label the persuasive advertising function of a trade symbol goodwill is irrelevant to its claim to protection in the law of unfair competition. Legal goodwill is a shorthand statement of a conclusion, not a tool for reaching a conclusion.

The demand for judicial protection against misappropriation of values created by the skill or effort of a competitor stems from a theory of competition which cannot be examined here in detail.[146] The ethical basis of the theory is flavored with scripture; "he who reaps where he has not sown" is said to be unjustly enriched.[147] Ripened by the news piracy case of *International News Service v. The Associated Press* [148] the misappropriation doctrine then withered on the vine, and is now confined pretty narrowly to cases related to news reporting.[149] Its gross fallacy is the assumption of a general policy in favor of monopolies in ideas, systems, or any ingenious contrivance. Actually the limited monopolies of trade-mark, patent and copyright stand as narrow exceptions to the "general rule of law" that "the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use." [150]

Echoes of misappropriation theory are heard in trade name cases as a counterpoint to complaints against dilution; the plaintiff has created the market, defendant should not be allowed to share in it. Specifically, it is used to bolster claims to exclusive use of the class of marks described earlier as inherently potent. The plaintiff has the wit to call his chocolate "Ambrosia"; should a vendor of "Ambrosia" cakes be allowed to tempt buyers nurtured on the classics and hungry for the food of the gods? The Fourth Circuit says he can: "Ambrosia" was not an invention to be rewarded with a patent monopoly; "a man of ordinary intelligence could easily devise a score of valid trade-marks in a short period of time." [151] The promoter of Pocket Books desires to be rid of one of the imitators who copied the getup of the convenient volumes. Will the courts reserve to him the appearance of the books, the badge of his ingenuity? No, the New York Court of Appeals held.

146. See 1 CALLMANN, cc. 1, 2, 15 (1945).

147. See Callmann, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition,* 55 HARV. L. REV. 595 (1942).

148. 248 U.S. 215 (1918).

149. Associated Press v. KVOS, 80 F.2d 575 (C.C.A. 9th 1935), *rev'd for want of jurisdiction,* 299 U.S. 269 (1936). See Comment, *Unfair Competition and Exclusive Broadcasts of Sporting Events,* 48 YALE L. J. 288 (1938); Chafee, *Unfair Competition,* 53 HARV. L. REV. 1289, 1314 (1940).

150. Brandeis, J., dissenting in International News Service v. Associated Press, 248 U. S. 215, 250 (1918).

151. Ambrosia Chocolate Co. v. Ambrosia Cake Bakery, Inc., 165 F.2d 693 (C.C.A. 4th 1947), *cert. denied,* 68 S. Ct. 914 (1948) (laches and absence of confusion also found).

Buyers of books are presumably literate, and any one who cares can identify the source.[152] But two judges thought the defendant was misappropriating the plaintiff's format and should be enjoined. The minority view is persistent.[153] It lets admiration for innovation obscure the soundness of rules designed to foster free and easy competition. And it overlooks the complications that would result if the judges embarked on a quixotic venture in giving prizes to advertisers. The majority [154] is right in sticking to the proposition that the only interests in trade symbols worth protecting are those against loss of sales or loss of reputation.

The Technique of Defense

It should not be technically difficult to defend the view that persuasive values, as such, are not entitled to protection in trade name cases. The defendant can simply answer that the plaintiff who seeks relief against dilution or misappropriation does not state a cause of action. The federal Trade-Mark Act makes its remedies available only where the defendant's use of the mark "is likely to cause confusion or mistake or to deceive purchasers as to the source of . . . goods or services." [155] If the plaintiff moves on to the broader ground of unfair competition, and, taking his cue from Mr. Justice Frankfurter, declares that the defendant "poaches upon the commercial magnetism of the symbol,"

152. Pocket Books, Inc. v. Meyers, 292 N.Y. 58, 54 N.E.2d 6 (1944).

153. See Aetna Casualty & Surety Co. v. Aetna Auto Finance, 123 F.2d 582 (C.C.A. 5th 1941), *cert. denied*, 315 U.S. 824 (1942) (misappropriation language in trade name confusion case); RCA Mfg. Co. v. Whiteman, 28 F. Supp. 787 (S.D.N.Y. 1939), *rev'd*, 114. F.2d 86 (1940) (musical performance, not copyright); Germanow v. Standard Unbreakable Watch Crystals, 168 Misc. 814, 6 N.Y.S.2d 571 (Sup. Ct. 1938), *aff'd*, 256 App. Div. 1031, 10 N.Y.S. 2d 976 (4th Dep't. 1939), *rev'd*, 283 N.Y. 1, 27 N.E.2d 212 (1940) (business system, not patented).

154. See Zlinkoff, *Monopoly Versus Competition*, 53 YALE L. J. 514, 546-9 (1944).

155. 60 STAT. 427, 437, § 32 (1946), 15 U.S.C.A. § 1051, § 1114(1)(a) (Supp. 1947). *But cf.* the Massachusetts statute, note 121 *supra*, and *quaere* if by some osmosis it affected the curious opinion of the First Circuit Court of Appeals in Pro-Phy-Lac-Tic Brush Co. v. Jordan Marsh Co., 165 F.2d 549 (1948)? The holder of the registered mark "Jewelite" for hairbrushes sued to enjoin the use of the mark "Gem Lite," also on brushes. No likely confusion was found. The plaintiff then argued that the "memory value" and good will of its mark should be protected from dilution. Deciding the case under the 1905 Trade-Mark Act, which permitted relief only where the mark was used on "merchandise of substantially the same descriptive properties," 33 STAT. 728 (1905), 15 U.S.C. § 96 (1940), the court held that the dilution doctrine "has no application" to a case within the statute, and since the goods in question were of the same descriptive properties, "no bearing upon the situation with which we are here concerned." 165 F.2d at 533. This holding seems to be correct, and equally applicable to any case brought under the 1946 Act. The court, however, went on to explain that "the dilution doctrine operates to give the owner of a registered trade-mark the same protection against the use of his mark by others on goods of different descriptive properties. . . . But the marks must be deemed similar before the doctrine has any application." In a final flourish of dicta the court said that "the word 'jewel', being weak, was already diluted". *Ibid.*

the plea is the same. The heavy artillery of precedent is on the side of the defendant.[156] Only if a counterattack is planned to deny the plaintiff any relief, even against confusion, does it become necessary to consider the interesting possibility of borrowing from the patent cases the defense that the plaintiff's conduct violates the anti-trust laws.[157] As yet there is no substantial precedent to indicate the degree of control of an industry through trade symbols which would be held a restraint of trade or an attempt to monopolize any part of trade or commerce.[158] That the trade-mark monopoly, like the patent monopoly, is confined by the policy of the anti-trust laws seems unquestionable.[159] Perhaps an over-bold plaintiff, asking the courts to police a scheme of industrial dominion, will invite retaliation and cast some light on these matters.

The Wretched Defendant

It may now be objected with complete propriety that the discussion has been one-sided. It has been exclusively concerned with the plaintiff's supposed desire to escape from the heat of competition, an arena

156. Part II of this paper *passim*. Deserving of special mention *contra* is Stork Restaurant Inc. v. Sahati, 166 F.2d 348 (C.C.A. 9th 1948), in which the court, at the prayer of the well-known night club, enjoined a small San Francisco tavern from using its name and insigne. Among the grounds for decision were: plaintiff's advertising outlay, threat of dilution, confusion of ignorant patrons, protection of goodwill, and misappropriation. On each of these matters the court took a position contrary to that advanced herein. As an antidote to this remarkable brew, *cf.* California Fruit Growers Exchange v. Sunkist Baking Co., 166 F.2d 971 (C.C.A. 7th 1947), notes 4 and 138 *supra*.

157. *Cf.* Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942). The doctrine of the *Morton Salt* case and its successors evolves from the equitable doctrine requiring clean hands. See Note, 51 YALE L. J. 1012 (1942). Clean hands, as hitherto applied in trade name cases, has referred chiefly to fraudulent misrepresentations by the plaintiff, either in the symbol or advertising. See 2 CALLMANN 1422. For a whimsical suggestion that the "almost fantastic chasm" between the cost and price of a heavily advertised cosmetic might justify withholding relief, "come the millenium," see Bourjois Inc. v. Hermida Laboratories, Inc., 106 F.2d 174, 177 (C.C.A. 3d 1939).

158. For discussion of possible misuse of trade symbols to divide markets, enforce price-fixing agreements, etc., see Borchardt, *Are Trade-Marks an Antitrust Problem?*, 31 GEO. L. J. 245 (1943); Diggins, *Trade-Marks and Restraints of Trade*, 32 GEO. L. J. 113 (1944); Lockhart, *Violation of the Anti-Trust Laws as a Defense in Civil Actions*, 31 MINN. L. REV. 507, 564 (1947). The recent consent decree accepted by the A. B. Dick Co. includes a dedication of the trade-mark "Mimeograph" to public use. U.S. v. A. B. Dick Co., CCH TRADE REG. REP., '48-'51 COURT DECISIONS ¶ 61,114, ¶ 62,233 (1948).

159. The new Act provides as one of seven defenses which prevent the conclusive use of the mark in evidence, "that the mark has been or is being used to violate the antitrust laws of the United States." Trade-Mark Act § 33 (b) (7), 60 STAT. 427, 439 (1946), 15 U.S.C.A. §§ 1051, 1115(b) (7) (Supp. 1947). Whether the defense is limited to cases where the mark is asserted to be incontestable, or whether it applies in all cases under the Act, will have to be determined by the courts. As regards the ambiguous legislative history, compare ROBERT, NEW TRADE-MARK MANUAL 205–11 (1947) with Lockhart, *op. cit. supra* note 158 at 566–8. The point will be further discussed in a later article.

in which we are determined to keep him pent for the common good. But if plaintiff loses, defendant wins. We have previously referred to defendant impartially as a copier or an imitator. Is he not also likely to be a cheat, a chiseler, and, worst of all, a newcomer? No doubt all these epithets are often merited. We have been dealing with a segment of the law of unfair competition, which, lending legal support to the enlightened ethical standards of the business community, has concentrated on curbing the chicanery of traders. Unfair competition's emphasis on unfairness has perhaps led to some neglect of competition.[160] The disproportion of this paper has been deliberate, since it is an attempt to redress the balance by taking a hard look at one manifestation of our supposedly competitive economy, the institution of advertising, and at one of its handmaidens, the trade symbol.

We may relegate to a footnote technical questions of fraud, malice, and intent,[161] and still agree that shoddy tactics on the part of defendants may have made many courts kinder to plaintiffs than the interests we have analyzed would require. Generally, however, the judge, despite the distractions of vice, keeps his eye on the plaintiff's case, or lack of it.[162] Taking that case as we have charted it, with the public and the plaintiff protected against any probable confusion caused by the defendant's tricks, we may briefly measure the defendant's conduct against the same economic standards we have applied to plaintiffs.

Consider the termites who have undermined the well-known brand name, "Coca-Cola." The once impregnable position of this mark has been shaken by the popular adoption of "cola" as the generic name descriptive of the kind of drink,[163] so that the First Circuit could recently hold that the name "Polar Cola" on a similar beverage would

160. *E.g.*, "There is no fetish in the word 'competition.' The invocation of equity rests more vitally upon the unfairness." Vogue Co. v. Thompson-Hudson Co., 300 Fed. 509, 512 (C.C.A. 6th 1924), *cert. denied*, 273 U.S. 706 (1926).

161. Proof of fraud as a foundation for an action is unnecessary in trade symbol cases. 3 RESTATEMENT, TORTS § 717 comment *a*. The defendant's motive is assumed to be to make money, which is not condemned. *See* L. E. Waterman Co. v. Modern Pen Co., 193 Fed. 242, 246 (S.D.N.Y. 1912), *modified*, 197 Fed. 534, 536 (C.C.A. 2d 1912), *aff'd*, 235 U.S. 88 (1914). His intent, that is, whether his appropriation of plaintiff's symbol was deliberate or unwitting, is, as has been mentioned, a somewhat perverse guide to the likelihood of confusion, note 129 *supra*; and a finding of intent to appropriate is essential to the award of damages, but not to an injunction. 3 RESTATEMENT, TORTS § 745.

162. For a controversy in which the court may have been unduly kind to the defendant, see the nine years of litigation against one S. L. Stetson arising from the deceptive use of his name in the hat business: John B. Stetson Co. v. Stephen L. Stetson, 14 F. Supp. 74 (S.D.N.Y. 1936), *modified* 85 F.2d 586 (C.C.A. 2d 1936), *cert. denied* 299 U.S. 605 (1936), contempt proceedings, 128 F.2d 981 (C.C.A. 2d 1942); 133 F. 2d 129 (C.C.A. 2d 1943).

163. Dixi-Cola Laboratories v. Coca-Cola Co., 117 F.2d 352 (C.C.A. 4th 1941), *cert. denied* 314 U.S. 629 (1941); see 2 CALLMANN 1339; 27 VA. L. REV. 839 (1941).

not cause confusion.[164] We may assume, however, that it would dilute the still formidable magnetism of the older mark. The defendant can use his borrowed potency to conform, as nearly as may be, to the price-level made possible by the successful differentiation of Coca-Cola. He may in addition use the magic of the name to cloak an inferior product. Neither result would be in the public interest. But he may equally, having access to the buying public controlled by the name, offer an indistinguishable product at a lower price.[165] The public would benefit. At the same time the monopoly price commanded by the original differentiated product would become less tenable, and in the cola field as a whole the possibility of achieving extreme differentiation through advertising would decrease.

Consider further the hypothetical case of a seller of hypodermic needles who adopts as a tradename "Coke," the alternative trademark of the Coca-Cola Company. Assume that a court would not find the products sufficiently related to warrant granting the Company an injunction. But assume that the needle maker would attract to his product some of the potency of the name. He may use it to differentiate his needle from its competitors, and thus get a higher price than he otherwise could. No benefit to the public results. But especially if his example is followed by makers of, say, coconut candies, furnaces, and aniline dyes, who also adopt "Coke" as a trade name, the advertising value of the symbol to all its users is progressively diluted. Advertising differentiation becomes increasingly less feasible, though interested buyers would have no difficulty in identifying their purchases. In short, we may concede that the privileged imitator is likely to use the symbol to differentiate his product from its competitors, and thus get higher prices for it. But this is no more than what the plaintiff has attempted. The upshot, from an economic point of view, is that we may borrow an ancient legal symbol, and, labelling both parties *in pari delicto*, leave them where we find them.[166]

Those to whom this sort of analysis is distasteful may find it so, among other reasons, because they dislike imitators. Probably it is

164. Coca-Cola Co. v. Snow Crest Beverages, Inc., 162 F.2d 280 (C.C.A. 1st 1947), *cert. denied*, 68 S.Ct. 110 (1947).

165. For instances of judicial recognition that a privileged copy was cheaper, see J. C. Penney Co. v. H. D. Lee Mercantile Co., 120 F.2d 949 (C.C.A. 8th 1941) ("The record indicates that defendant was able to retail its garments at approximately twenty cents less than those of plaintiff, and this is perhaps the main root of plaintiff's grievance." *Id.* at 958); Smith, Kline & French Laboratories v. Waldman, 69 F. Supp. 646 (E.D.Pa. 1946) (note 37 *supra*).

166. "A court of equity will leave these parties much as it would two poker players to collect their debts as best they can and leave the public to its legal rights of law enforcement." James Heddon's Sons v. Millsite Steel & Wire Works, 35 F. Supp. 169, 178 (E.D. Mich. 1940), *aff'd*, 128 F.2d 6 (C.C.A. 6th 1942) (appearance case; judgment for defendant).

futile to recall that we are all imitators, and that our society is committed to the proposition that progress is advanced by the free use and adaptation of novel things and ideas. In a famous trade name case, Justice Brandeis said,

> "[Defendant] is undoubtedly sharing in the goodwill of the article known as 'Shredded Wheat'; and thus is sharing in a market which was created by the skill and judgment of plaintiff's predecessor and has been widely extended by vast expenditures in advertising persistently made. But that is not unfair. Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested." [167]

A limited number of limited monopolies is thought desirable, in the case of patents to encourage true inventiveness, in the case of trade symbols to reach certain goals we have been defining. To condemn possible solutions because they favor free riders denies "the basic common law policy of encouraging competition and the fact that the protection of monopolies in names is but a secondary and limiting policy." [168]

III. Conclusion

In concluding, it will be observed that there is not a high degree of correlation, in the field we have surveyed, between what the courts do and (1) what the champions of advertising would like them to do, or (2) what those who believe that persuasive advertising should make its way without legal protection would like them to do. One reason for the shortcoming, from the point of view of the latter group, is that the defendants in trade symbol cases are not very handy champions of injured innocence. But the main reason is the manifold nature of a trade symbol. As we have seen, it may at once represent:

(1) the source of goods
(2) the reputation of that source
(3) satisfaction with the goods themselves
(4) persuasive advertising value
(5) intrinsic symbol value.

We have agreed that the first three are desirable private interests, entitled to protection. The last two are not. But if they are all combined in a single symbol, the degree of exclusive use permitted as a safeguard against confusion of source, reputation, or goods, necessarily carries the rest along with it.

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167. Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 122 (1938).

168. Frank, J., in Eastern Wine Corp. v. Winslow-Warren Ltd., 137 F.2d 955, 959 (C.C.A. 2d 1943), *cert. denied*, 320 U.S. 758 (1943). See p. 1166 *supra*.

The fact that the issue is not clear-cut, however, is no occasion for deserting the field. Trade symbol cases are more than private matters of tort liability and equity practice. Persistent claims are made on behalf of advertising values which should be resisted. Every case requires decisions that are matters of degree, on issues like confusion, identity of goods and markets, or the legitimacy of a symbol.[169] The scales are easily tipped toward one set of values or another. Plaintiffs come into court with moral accusations of unfair competition, which are in fact often aimed at the elimination of competition. In trade name cases, particularly, "the doctrine of so-called 'unfair competition' is really a doctrine of 'unfair intrusion on a monopoly.' " [170] Plaintiffs also pose as champions of the consumer. But we have seen that the consumer may have no concern in the advertising claims of either party. He is concerned with reducing the wastefulness of persuasive advertising. The policy of the law is one way of expressing that concern.

Finally, it may be worth pointing out that the views presented here are conservative ones. They stem from a belief that less consumption of advertising would mean more consumption of goods. They further assume that in a free society the channels of competition should be kept open. Immoderate regard for entrenched brand-name interests can freeze the pattern of industries, as has probably happened in soap and cigarettes. These views are conservative also in that they would preserve the basis for judicial action in this area pretty much as it stands. Its historical foundation, that "the wrong involved is diverting trade from the first user by misleading customers who mean to deal with him" may be a narrow one, but its limitations serve as a barrier to powerful pressures. In an acquisitive society, the drive for monopoly advantage is a very powerful pressure. Unchecked, it would no doubt patent the wheel, copyright the alphabet, and register the sun and moon as exclusive trade-marks. It is true that the restraining influence of the courts is largely passive. Withholding remedies leaves persuasive advertising in the limbo of Sabbath-breaking and gambling contracts. Whether any active measures are called for, and what part the courts may have in enforcing them, is another story.

169. For a model of trial court analysis of a trade name problem, weighing all the relevant legal and economic factors in the context of the market in dispute, see the opinion of Wyzanski, J., in National Fruit Product Co. v. Dwinell-Wright Co., 47 F. Supp. 499 (D. Mass. 1942), *aff'd*, 129 F.2d 848 (C.C.A. 1st 1942).

170. Frank, J., concurring in Standard Brands v. Smidler, 151 F.2d 34, 40 (C.C.A. 2d 1945). My debt to the three opinions last cited will be recognized by anyone who has read them. Equally apparent, perhaps, is my reliance on the long line of classic utterances by Judge Learned Hand in this field, which have often established and always respected the limits of judicial law-making. Finally, I gratefully acknowledge, since it is not at all apparent, that this paper has profited immensely from the probing and polishing given it by my wife.